TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 101.

MOLYNEAUX L. TURNER, APPELLANT AND PLAINTIFF IN ERROR,

vs.

AMERICAN SECURITY AND TRUST COMPANY, THE CHILDREN'S HOSPITAL, AND THE GARFIELD MEMORIAL HOSPITAL.

APPEAL FROM AND IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 3, 1907.

(20,750.)

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In the Court of Appeals of the District of Columbia.

No. 1747.

MOLYNEAUX L. TURNER, Appellant,
vs.
AMERICAN SECURITY AND TRUST COMPANY ET AL.

1 In the Supreme Court of the District of Columbia, Holding a Probate Court.

In re the Estate of HENRY E. WOODBURY, Deceased. No. 12807.

Petition.

Your petitioner, the American Security and Trust Company, respectfully shows unto the Court as follows:

1. That it is a corporation organized and doing business in the District of Columbia, under the authority of the laws in force therein, and is duly authorized by law to act as the executor and administrator of the estates of the deceased persons.

2. That Henry E. Woodbury, late a citizen of the United States and a resident in the District of Columbia, departed this life on or about the fifteenth day of January, 1905.

3. That decedent died possessed of both real and personal property situate in the District of Columbia.

4. That decedent left a last will and testament which bears date the eleventh day of April, 1902, and five codicils thereto, which bear date respectively January 5, 1903; October 30, 1903; December 21st, 1903; February 18, 1904; and December 20th, 1904.

5. That decedent left surviving him his widow, Anna L.
2 Woodbury and as his next of kin and sole heir at law his nephew, Molyneaux Turner, the son of a deceased sister, both of lawful age and both, as your petitioner is informed and believes, are residents in the District of Columbia.

6. That decedent died seized and possessed, or was the equitable owner of the following described real estate situate in the City of Washington, District of Columbia, to-wit:

Dwelling house No. 2325 L St. N. W. assessed value of..	$3,202.00
Dwelling house No. 912—12th, N. W. assessed value of..	5,727.00
Dwelling house No. 421 New Jersey Ave. S. E., assessed value of.....	3,775.00

And personal property as follows:

Money on deposit with American Security and Trust Company	618.01
Household furniture	500.00
Stocks at the estimated value of	16,335.00
Bonds of the estimated value of	2,321.57
Watches and jewelry	100.00

7. That debts due and payable from the estate of decedent are principally those incurred during his last illness and his funeral expenses which do not, so far as your petitioner has been able to ascertain, exceed the sum of $800.00.

8. That with the exception of personal effects not subject to appraisement, your petitioner does not know of any other property, real or personal, which belongs to decedent.

9. That your petitioner is named in and by the last will and testament of said Henry E. Woodbury, the sole executor thereof,
3 and as such it is advised by counsel and believes and hence avers it is entitled to have letters testamentary issued to it on his estate.

Wherefore your petitioner prays that said last will and testament be admitted to probate and record as a will of real and personal property, and that letters testamentary thereon may be issued unto it; and further, that all necessary writs may issue and orders be made in the premises and for such other and further relief as to the Court may seem necessary and proper.

And your petitioner will ever pray.

AMERICAN SECURITY AND TRUST COMPANY,
[CORPORATE SEAL.] By CHARLES J. BELL, *President.*

Attest:
CHAS. E. HOWE,
Ass't Secretary.

WM. F. MATTINGLY,
WM. A. McKENNEY,
For Petitioner.

DISTRICT OF COLUMBIA, *ss:*

I, Charles J. Bell, being first duly sworn, depose and say that I am President of the American Security and Trust Company, the above named petitioner; that I have read the foregoing petition by me as such President subscribed; that I know the contents
4 thereof; that the matters and things therein set forth are true to the best of my information and belief.

CHARLES J. BELL.

Subscribed and sworn to before me, this 24th day of March A. D. 1905.

[NOTARIAL SEAL.] ALFRED B. LEET,
Notary Public, D. C.

Commission expires Dec. 20, 1907.

(Endorsement: Petition of American Security and Trust Co. Filed Mar. 27, 1905. James Tanner, Register of Wills, D. C., Clerk of Probate Court. Wm. F. Mattingly & Wm. A. McKenney, for Petitioner.)

5 In the Supreme Court of the District of Columbia, Holding a Probate Court.

In re Estate of HENRY E. WOODBURY, Deceased. No. 12809.

Answer and Caveat.

The joint and several answer of Anna L. Woodbury, of the City of Washington, District of Columbia, widow of the late Henry E. Woodbury and of Molyneaux L. Turner of the said City and District, nephew and sole heir at law of the said Henry E. Woodbury, to the petition of American Security and Trust Company filed in the above entitled cause on the 27th day of March 1905 for the admission to probate and record of certain paper writings purporting to be a last will and testament of the said Henry E. Woodbury and Codicils thereto and also the Caveat of the said widow and heir at law to the admission of the said paper writings to probate and record as a last will and testament.

For answer to the said petition and also as a Caveat to the Probate of said alleged will, the respondents say:

1. They admit the averments of the first paragraph of said petition.

2. They admit the averments of the second paragraph.

3. They admit the averments of the third paragraph but having no complete knowledge of the nature and extent of the said property will require strict proof thereof.

6 4. They deny that the said paper writings mentioned in the fourth paragraph of the petition are the last will and testament of the said Henry E. Woodbury but on the contrary aver that the said Woodbury died intestate.

First. Because the said Woodbury on the date mentioned in this paragraph of the petition and for a long period of time prior thereto was not capable of making a valid deed, will, or contract.

Second. Because said Woodbury labored under an insane delusion as to the sentiments and conduct toward him of the natural objects of his bounty to wit; his wife and his nephew and only heir, and was by such delusion prevented from making a valid will.

Third. Because the said paper writings were obtained from the said Woodbury by the importunities and undue influence of Sallie

Woodbury, Mena M. Stevens, and other persons unknown to the respondents, who by reason of such importunities and undue influence controlled the will of the said Woodbury so that the said paper writings express not the testamentary intentions of the said Woodbury but of the said persons.

5. They admit the allegations of the fifth paragraph of the petition.

6. They have no such knowledge of the estate of the said
7 Woodbury as will enable them to answer this paragraph of the petition, but that the property therein mentioned comprised all the estate real and personal of said deceased, at the time of his death or that its value was or is as alleged they will require strict proof.

7. They have no knowledge of the matters alleged in this paragraph of the bill and thus neither admit nor deny the same but will require strict proof thereof.

8. They neither admit nor deny that the petitioner does not know of any other property real or personal which belonged to the deceased, but they aver and charge that the said Woodbury died seized and possessed of certain other property which is omitted from the schedule given in paragraph six of said petition. As to what *personal* effects have been omitted from said sixth paragraph of the petition as not subject to appraisement, and why the same are not subject to appraisement or why they have been omitted from the petition or in whose custody the same, if any, are; these respondents being without knowledge cannot answer.

9. They admit that the petitioner is named in said paper writings as executor. They deny for the reasons hereinbefore set forth that said paper writings are a valid will or testament and they consequently deny that the petitioner is entitled to letters testamentary in said estate.

8 And now having answered all the averments of the said petition the respondents pray that their said answers may stand as a Caveat to the admission of the said paper writings to probate and record as the last will and testament of the said Henry E. Woodbury.

ANNA L. WOODBURY.
MOLYNEAUX TURNER.

CHARLES F. CARUSI,
Solicitors for Caveators.

DISTRICT OF COLUMBIA, *ss:*

Anna L. Woodbury and Molyneaux L. Turner being first duly sworn depose and say, they have read the foregoing Caveat and answer by them subscribed and know the contents thereof and the matters and things therein stated as of their own knowledge are true and those stated upon information and belief they believe to be true.

MOLYNEAUX TURNER.
ANNA L. WOODBURY.

Subscribed and sworn to before me this 18 day of May A. D., 1905.

[NOTARIAL SEAL.] EUGENE D. CARUSI,
Notary Public.

(Endorsement: Answer and Caveat of M. L. Turner and Anna L. Woodbury. Filed May 19, 1905. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

9 In the Supreme Court of the District of Columbia.

Est. of HENRY E. WOODBURY.

In the Matter of the Caveat of ANNA WOODBURY and MOLYNEAUX TURNER. Probate No. 12809.

Probate No. 12809.

Upon consideration of the petition of American Security and Trust Company for the probate and record of certain paper writings heretofore filed in the office of the Register of Wills purporting to be the last will and codicils thereto of Henry E. Woodbury, deceased, and of the answer and caveat thereto of Anna L. Woodbury and Molyneaux Turner, it is this 6th day of October ordered, that the following issues be tried before a jury.

(1.)

At the time of the execution of the said several paper writings propounded for probate as the last will and testament of Henry E. Woodbury, deceased, was the said Henry E. Woodbury of sound and disposing mind and capable of making a valid deed or contract.

(2.)

Was execution of said paper writings procured by the fraud or undue influence of Sallie Woodbury, Mena Stevens or either of them or any other person or persons.

And it is further ordered that the foregoing issues be set for trial by jury on the 8th day of November, 1905.

WENDELL P. STAFFORD, *Justice.*

(Endorsement: *In re* issues. Filed Oct. 6, 1905. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

10 Memo: Feb. 26, 1906.—Docket Entries:
Order that issues be tried by jury in attendance upon Criminal Court No. 2.
Order making Caveators plaintiffs and Caveatees defendants.
Jury sworn and respited until tomorrow.

11 Memo: Mch. 6, 1906.—Verdict sustaining will.

12 Memo: Mch. 30, 1906.—Motion for new trial overruled and judgment on verdict.

13 In the Supreme Court of the District of Columbia, Holding a Probate Court.

In re Estate of HENRY E. WOODBURY, Deceased. No. 12809, Adm. Doc. 33.

This cause came on to be heard upon the pleadings and proceedings herein, and upon consideration of the verdict of the jury upon the several issues framed for trial in this cause, it is, this 12th day of April, 1906, adjudged, ordered and decreed that the paper writings filed in this court and dated April 11, 1902, January 5, 1903, December 21, 1903, February 18, 1904, and December 20, 1904, purporting to be the last will and testament and the codicils thereto of Henry E. Woodbury, deceased, are such last will and testament and codicils and that the same be, and they are hereby, admitted to probate and record as a will of both real and personal property; and it is further adjudged, ordered, and decreed that letters testamentary issue forthwith to The American Security and Trust Company, the executor named in said will.

WENDELL P. STAFFORD, *Justice.*

14 Memo: April 13, 1906.—Letters testamentary issued to American Security and Trust Co.

15 Memo: April 16, 1906.—Notice of appeal, citation and order for transcript.

16 Supreme Court of the District of Columbia, Holding a Probate Court.

MOLYNEAUX L. TURNER, Complainant, Plaintiff,
vs.
AMERICAN SECURITY & TRUST CO. ET AL., Defendant-.

Estate of HENRY E. WOODBURY, Deceased. No. 12809, Administration.

The President of the United States to American Security & Trust Company, The Childrens' Hospital, The Garfield Memorial Hospital, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal from the Probate Court of the Supreme Court of the District of Columbia, on the 16th day of April, 1906, wherein Molyneaux L. Turner, is Appellant, and you are Appellee, to show cause, if any there be, why the Verdict rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of said Court, this 16 day of April, A. D. 1906.

[COURT SEAL.]

Attest: WM. C. TAYLOR,
Deputy Register of Wills for the District of Columbia,
Clerk of the Probate Court.

Service of the above Citation accepted this 16" day of April, 1906.
WM. F. MATTINGLY,
Attorney for Appellee.
THE AM. SEC. & TRUST CO.
THE CHILDRENS' HOSPITAL.
STANTON C. PEELLE,
Att'y for Appellee, Garfield Hospital.

(Endorsement: Citation on Appeal. Issued April 16, 1906. Filed Apr. 18, 1906. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

17 Memo: Ap'l 18, 1906.—Order fixing penalty of appeal bond at $100.

18 Memo: Ap'l 25, 1906.—Appeal bond approved.

19 In the Supreme Court of the District of Columbia.

In re Estate of HENRY E. WOODBURY, Deceased. Probate No. 12809.

Upon consideration of the motion of M. L. Turner for leave to sever on appeal from the executors of Anna L. Woodbury, it is this 14th day of November, 1906, ordered that said motion be and it is hereby granted.

JOB BARNARD, *Justice.*

(Endorsement: Order granting severance on appeal. Filed Nov. 14, 1906. James Tanner, Register of Wills, D. C., Clerk of Probate Court. J. J. Darlington, Chas. F. Carusi, Attys.)

20 In the Supreme Court of the District of Columbia, Special Term for Probate Business.

In the Matter of the Will of HENRY E. WOODBURY, Dec'd. No. 12809, Admr. Doc. 33.

Bill of Exceptions.

At the trial of the issues joined under the caveat to the probate of the said will by Anna L. Woodbury and Molyneaux L. Turner, begun on the 26th day of February, A. D. 1906, before

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the Hon. Job Barnard and a jury duly sworn and empaneled, Messrs. J. J. Darlington and C. F. Carusi appearing on behalf of the caveators, Messrs. Wm. F. Mattingly and Wm. McKenny on behalf of the caveatee, The American Security and Trust Company, and Messrs. Wm. F. Mattingly and Stanton C. Peelle on behalf of the caveatees, the Garfield Hospital and the Children's Hospital, devisees under the will, the caveators, to maintain the issues on their part joined, offered as a witness duly sworn one Charles Coomb, who testified that he had known the said Henry E. Woodbury for about twenty-five years, and had lived about a square from him for that length of time; during that period witness would see him now and then at different times, a year apart maybe or something like that; that witness, who is a painter, would go to the testator's house to do work there, most of the work was for his sister; that the testator would talk about it, and would not seem to under-
21 stand it, or to understand what he wanted done; that his sister Sally Woodbury, who lived with him, would tell him to go away and she would attend to it; that witness noticed these things on two or three occasions, and that he first noticed them four or five years before testator's death; that he would forget, and talk about different things, would start on one thing and then talk about something else entirely different; that witness last saw him in 1901 *or* 1902, when he went to see about buying a house on 12th Street which the testator owned; that witness talked with the sister mostly, who would tell the testator to stop & she would do the talking, but he would talk now and then about it; that he seemed not to understand it—as if he did not know what he meant —did not want anything to do with it; and thereupon witness was interrogated as follows: "Q. On these different occasions to which you have testified *you when* saw him, did you form any opinion as to whether he was mentally capable of transacting business? A. Yes sir; I had an opinion. Mr. Mattingly: I object to his expressing his opinion. Mr. Darlington: On what ground? Mr. Mattingly: On the ground that there has not been a sufficient foundation laid." Whereupon the court sustained the objection and refused to permit the witness to state his opinion as to whether the testator was mentally capable of transacting business, to which ruling of the court the caveators then and there excepted, which exception the court duly entered upon its minutes.

Thereupon the caveators gave testimony tending to prove that the testator died on or about the 15th day of January, A. D. 1905,
22 at the age of 79 years, childless, and leaving him surviving his widow, the caveator, Anna L. Woodbury, and as his only heirs-at-law the caveator Molyneaux L. Turner, his nephew. The caveators then offered in evidence the record in Equity Cause No. 2,671 in the Supreme Court of the District of Columbia, instituted February 24th, 1872, as tending to show that the testator was subject to delusions, and also want of memory claiming, in the latter years of his life, that he had been divorced from his said wife, and as tending to show that he had alleged by his sworn

petition in his said suit for divorce a physical malformation on the part of his wife, rendering her incapable of a valid marriage, that an examination of his wife was made by physicians appointed by the court for that purpose, who found that the said charge was false and that the condition did not exist; that the offer was made for the purpose of showing delusions on the part of the testator as far back as that time, to be followed up by proof that they continued down to the time of his death, but the caveatees objected to the admission of this record, on the ground that it was too remote, that it related to a matter which occurred thirty years or more before the execution of the will and codicils, and that the case between the testator and his wife could not now be tried. "The Court: We do not want to try that issue now, whether it was a delusion. Even if it was a falsehood in the bill, there might have been some explanation of it if he were living. I do not think it is competent. Mr. Darlington: We offer it for the purpose I have stated. The court: I sustain the objection to it." To which ruling of the court, and to the exclusion of the said evidence, the caveators then and
23 there duly excepted, and the court duly noted their said exception upon its minutes.

The caveators then offered evidence tending to prove that the said testator brought an action against the District of Columbia for personal injuries received through a fall occasioned by a defect in the streets of the City of Washington; that the cause was tried in March, and again in December, of the year 1885, the accident having happened in the latter part of the year 1881; that at each of these trials the testator had testified that he had been in perfect physical and mental health prior to the accident had been a prosperous medical practitioner, and contributed to a number of medical journals and periodicals, was quoted as an authority with respect to certain diseases, and that his memory had been perfect prior to the accident; that since his said injury he had developed an "Old man's memory," could remember the past but not recent occurrences, would immediately forget what he had read, would forget the names and character of diseases with which he formerly had been perfectly familiar, that his mental impairment had been so great that he had given up the practice of medicine; that his spine had been injured, involving the spinal cord, that he was suffering from progressive myelitis, or degeneration of the spinal cord, affecting the brain; that the disease had invaded his mental powers, almost destroying them and making him a mental wreck, that he had suffered a lesion of the spine, involving his brain and mental powers.

Thereupon Mrs. Livie Arnold, a witness produced on behalf of the caveators, testified that she had known the testator
24 since she was a child, that he had been her mother's family physician and her own for about thirty years, that he ceased to be their family physician from the time of his accident in 1881, saying, himself, that his mental condition would not allow him to

continue practicing, and that he was not capable of writing prescriptions because of his mental condition; that she had noticed a very great change in his memory during the latter years of his life; that he would begin to talk on one subject and get off on something else that had no connection; that he very often talked of his wife, saying that he never could live with her, and had been divorced from her; that he made this statement with regard to being divorced from his wife on a great many occasions; that his strength of will was very poor, that his sister, Sally Woodbury, controlled him during her life, and his nurse, Mena Stevens, did after her death; that on one occasion after the death of his sister, when she visited him at his residence, he gave her a shawl, which had belonged to his sister, saying he wanted to do so while his said nurse was out, because he would "catch it if she knew about it," and that he did not want her to know anything about it;" that the witness had asked him for a prescription ten years before his death, thinking he was capable, and he had declared he was not, and that he was in her opinion not capable of making a valid deed or contract during the latter years of his life.

Thereupon Mrs. HULDA COOMES, a witness called on behalf of the caveators, testified that she had known the testator dur-
25 ing the last seven or eight years of his life, that she had attempted to negotiate with him for the purchase of his 12th Street house about five years before the trial; that on some occasions he would tell her he wished to sell, and on others that he did not, that the 12th Street house was an old homestead, that he had so many fond recollections connected with it, that he and his wife who was dead had lived there so happily that he did not wish to sell it, but to keep it for his nephew.

Dr. GEORGE P. VAUGHAN, a witness called for the caveators, testified that he was a practicing physician, had been Assistant Surgeon General of the Marine Hospital Service, and had practiced medicine for twenty-five years; that he had met the testator once upon a social occasion about five years before the trial, and made him a professional visit about a year later; was called in by Dr. Turner who was at that time living with his uncle; that he had received a very distinct impression on each of these occasions that he was a man of weak mind, mentally incapable of transacting business or of making a valid deed or contract.

J. ALFRED BATES, a further witness called on behalf of the caveators, testified that he had lived near the testator from the winter of 1896-7 until the fall of 1904; that at that time, namely, in 1896 and 1897, he found the deceased to be quite an intellectual conversationalist, talked with him on a wide range of subjects, but noticed certain peculiarities; that during the early part of this period testator seemed very fond of caveator Moly-
26 neaux L. Turner, very proud of his attainments, and anxious he should practice medicine, stating that he had set aside

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a room for him to be used as an office in the 12th Street house, and wished him to resign from the United States Army, in which he held the position of Assistant Surgeon, because such position prevented him from acquiring a practice, and to settle down to practice; that the said caveator Molyneaux L. Turner resided with the testator prior to the war with Spain, during which he was Assistant Surgeon as aforesaid, and also resided with testator after that time; that testator informed witness he had furnished the said caveator with seventy-five cents spending money per week, and gave him a memorandum book in which to keep an account of how he spent the said sum, complained that somebody had interfered, and that the young women of the neighborhood made fun of this arrangement; that during the last years of his life he displayed much animosity toward his nephew, and complained of ingratitude; that his animosity toward his nephew seemed abnormal, and that witness believed he was a monomaniac upon that subject and upon the subject of discipline; that witness last saw him within a month of his death, at which time he did not mention his nephew, but spoke of being at peace with the world and in readiness to die, and of how he had forgiven all his enemies, at which time he worked himself up to such a state of excitement that he became violent and witness was afraid he would injure himself and left him for that reason. On cross-examination witness further testified as follows: Q. "Can you say whether or not that apparent ex-
27 citement and manner was owing to the difficulty he had in talking, because of his bronchitis? A. I think it was due in part to both. He seemed to have great difficulty in breathing," and further, that the witness did not think his manner rational.

WALTER WHITCRAFT, another witness introduced on behalf of the caveators, testified that the testator and his nurse, Miss Mena Stevens, boarded at witness' house at Forest Glen for four or five weeks during the summer of 1903, that he conversed five or six times with him; that, physically, he was an extremely feeble man, and had great difficulty in walking any distance and going up and down stairs; that, mentally, he would talk interestingly with perfect coherence up to the time he would break off, then stop abruptly, break off, recite stanzas of poetry, compose stanzas on his surroundings, would start to tell a story or something of his past life, get half way through it, stop abruptly, not continue the thread of the conversation at all; that he was of a decidedly nervous temperament, would get excited easily, that Miss Stevens would treat him exactly as a nurse would treat a patient, or a woman a helpless child; that on one occasion, when engaged in a very interesting conversation with the testator, she told him it was time to retire, he remonstrated and became very much agitated, when witness remarked that he supposed testator was the best judge of when he wished to retire, in reply to which, Miss Stevens said she was in charge of him, and knew better than he did what was good for him, and after this whenever she put in her appearance, witness construed it to be a cue for him

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to leave, and that in witness' opinion his mental capacity
28 was decidedly weak; that he was not capable of transacting business and that witness would not have any business transactions with him requiring considerable thought.

JOSEPH GAWLER, undertaker, called on behalf of caveators, testified that about a year before the testator's death the latter sent for him, stated he wished witness to conduct his funeral, that he had a nephew who was a damned rascal, that he did not want him to come into the house, did not wish witness to let him come to the funeral, and that his said "Nephew had already received more than he was entitled to" "what was coming to him and more besides"—and further, on cross-examination, witness testified as follows: "Q. Did he say from whose estate? A. No, he didn't say." At same interview, "testator talked about a number of little things, about gas stock and such things and we took a little drink and I came away."

Thereupon the caveator, MOLYNEAUX L. TURNER, offered as a witness in his own behalf, testified that he was the son of a deceased sister of the testator; that the family of the latter had consisted of a sister Margaret, who was witness' mother, a sister Sally, and a brother Dr. Edward Woodbury; that in 1893, shortly after witness' graduation in medicine, and when he was 23 years of age, he had been invited by Sally Woodbury to come from New York, where he resided, and visit herself and testator at their home in Washington, on which occasion he stayed a month, and, returning to New York, was appointed a physician in the Children's Hospital, being in charge of the insane division, after which he was appointed surgeon
29 on board of the Netherlands Steamship Line; following which he opened an office for the practice of medicine in the City of New York in the summer of 1895; that in the latter part of the year 1895 the health of Dr. Edward Woodbury having become much impaired, the testator came to New York, requested witness to give up his office and to come to Washington with the said Edward Woodbury, and to live at testator's house; that he did so, arriving in Washington about the 1st of January, 1896, and remained at the house of the testator, caring for his uncle Edward, until the death of the latter and according to the form of life prescribed by them, which form required that he should not be out of the house later than 9 o'clock in the evening, receiving 75 cents a week as spending money from the testator and keeping an account of his disbursements in a book provided for the purpose, which he should submit to the testator for examination to see how the same was expended, witness being then 27 years of age, and having been a practicing physician for four years; that in August, 1896, against the wishes of testator and Sally Woodbury, the witness received an appointment in the Emergency Hospital, for the customary period of eight months, which period was enlarged in his case for an additional four months, contrary to the custom of the Hospital authorities; that, on learning of the said extension, both the testator and his aunt Sally wrote letters to the Hospital authorities, endeavoring

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to have the said extension vacated and the witness dismissed from the hospital, the letter of the first being as follows:

30 2325 L St., West, Washington, D. C.,
December 31*st*, 1896.

To the attending staff or Board of Management of the Emergency Hospital.

Gentlemen: When my nephew, Dr. M. Turner, was appointed First Asst. Medical Officer in the Emergency Hospital in August last, although I did not wish him to take the position I decided not to oppose him as he would only be able to remain there for eight months.

I have just learned that he has made an arrangement to remain in his present position, and so will be in the service for eight months longer instead of four. I learn this is a personal arrangement between him and Dr. Lawrence, and not due to the action of the Board.

I would therefore respectfully request that it be annulled, and if practicable, he be advanced in regular order.

I regret my protest was not filed sooner, but hope it is not too late for favorable action.

I am, Gentlemen,
Very truly yours, HENRY E. WOODBURY."

The witness further explained that to be "Advanced in regular order" as per the testator's letter, was to be put out of the Hospital; that testator had not spoken to him about the letter before sending it, and that the first witness knew of it was when it was shown to him by Dr. Burnett, the physician in charge; that the letter of his aunt Sally, which testator told witness he knew about before it was sent was as follows:

"2325 L St., *January* 2*nd*, '97.

Dr. Wm. H. Hawkes, Secretary Emergency Hosp. Staff.

Dear Sir: You have probably received the communication from my brother relative to Dr. Turner's promotion at the Emergency Hospital.

I hope you will lend your influence in his favor as far as possible, for there are circumstances which will militate against his future welfare if he persists in extending his period of service longer than four months.

My anxiety in regard to him is my excuse for intruding
31 this hasty note on you this morning.

Appreciating your courtesy and kind suggestion when I called on you, and hoping for a satisfactory result, I remain,
Very gratefully, SALLIE WOODBURY."

When asked about these letters witness said testator wanted him to come and live with them, to call on their tenants, collect the rents, cut the grass and do various odd jobs, but that testator made no proposal in regard to the practice of his profession; that during

CLOSE IN CENTER

the war with Spain, witness, by his unaided efforts, secured an appointment as Assistant Surgeon in the United States Army, at a salary of $1800.00 per annum, which appointment the testator, without witness' knowledge, and without conferring with him, endeavored to have cancelled, and afterwards admitted to him that he had made the effort without saying what he wished witness to do if he gave up that position; that the witness resigned his position as Assistant Surgeon in June 1900, because, if retained, he would be required to go to the Philippine Islands, and in the early part of 1901, at the request of his aunt Sally Woodbury, he came to Washington, and lived with her and the testator; that the first and only effort by his uncle to embark him on the practice of medicine was finally in June 1901, to furnish a room for him, his uncle sent a few pieces of furniture to furnish an office room in the 12th Street house, which was then vacant, requiring the witness to have as his office hours from 12 to 1 o'clock and from 4 to 6 o'clock, there
32 being no one to answer the bell but the witness during these hours and no one at all in the house at other hours, no instruments furnished him except a stethoscope and he had but very few instruments of his own, while in the army the instruments being supplied by the government, that it was impracticable to practice medicine successfully under these conditions, and Sally Woodbury complained later that the office prevented the renting of the house, that the house could not be rented because witness had a room there as his office; that, during the hours of the day not covered by the said office hours, the testator and Sally Woodbury required him to do odd jobs as above set forth; that about the month of October, 1901, the caveator Anna L. Woodbury, whose business affairs had become involved, asked witness to take a room at her house, which he did, and gave his time to a copper mine corporation in which she was largely interested until its affairs were straightened out; that his going there made no difference in his relations with the testator and his aunt Sally Woodbury, and that he continued to visit them, and to dine and lunch with them occasionally, upon their invitation, and that they received him cordially; that testator was always affectionate when alone, but more reserved and cool in the presence of Sally Woodbury, whose treatment of him was pleasant but not so warm as before; that while residing at the house of the said Anna L. Woodbury, the testator made him a present of 30 medical books, in the latter part of 1901, or the early part of
33 1902; that, after the death of Sally Woodbury, which occurred on the 18th day of December, 1902, testator gave him two other medical books, one of which was rare and valuable; that under the will of his grandmother, some thirty years before the testator's death, the 12th Street house had been devised to the testator, in trust to collect and retain one half of the rent for his own benefit, and to divide the remaining rents between the testator's mother, Sally Woodbury and Edward Woodbury, and, upon any sale of the 12th Street house, to divide the proceeds equally, one fourth to each of the said parties; that in the year 1903, the testator asked him to sell to the latter witness' interest in said house, and,

upon witness inquiring why he wished this done, the testator said that it was to make his mind easy, and to keep him from worrying, whereupon witness told him that, if he wished to purchase it, witness would do whatever he desired; that the testator then said to him that he supposed the property was worth about $6,000.00, but that he, the testator, had been paying taxes and making repairs for 30 years, to none of which expenses witness had contributed, and that he would give witness $550.00 for his share; that witness had collected the rents of the house and knew that it paid six per cent. on $8,000.00, and that the testator would have no right to retain the rents during the thirty years, as he had done, giving witness no part of them, and to charge witness for taxes and repairs, but that, merely for the purpose of relieving testator's mind of worry, and to gratify him, he made the conveyance as requested; that during the years 1891, 1892 and 1893, the testator would start to talk upon a subject, follow it for two or three minutes, stop abruptly and then continue on something else; that the only
34 subject upon which he could sustain a continuous conversation was poetry; that witness had never been a dissipated man, his habits had never been objected to by the testator, that the latter never charged him with being ungrateful, and never remonstrated or complained about his going to reside at the home of Mrs. Anna L. Woodbury; that at Christmas, 1903, he sent to testator as a present a box of cigars, that their relations continued pleasant until about the month of February 1904, when the testator returned the cigars and requested the witness never to call at the house any more.

On cross-examination of this witness he testified that on or about October 18th, 1896, being then in the City of New York, he signed an agreement prepared by the testator, which was as follows:

"130 East 23rd St., N. Y., *October 18th,* 1898.

In accepting my Aunt's proposition to return to Washington and retrieve my past, I agree to the following conditions:—

1st. I will consider this an agreement, if my course is satisfactory and will ignore all steamer experiences henceforth. "Without the full consent and wishes of my Aunt and Uucle also my Uncle William H. Turner and my father."

2nd. I will not incur any debts outside of my home, nor borrow money and will keep away from Hospital employees, especially nurses, taking advice kindly from my Aunt, who will consider me in every rational way.

3rd. I agree with my Aunt and Uncle that no demand shall be made on me to return to New York, in case of any illness of my father," or my Uncles and Aunts on my father's side, unless it is of a serious character which my Uncle and Aunt will no doubt give their consent to."

4th. I will have hereafter no intercourse with Mr. Hammond at his house or any appointed place or his emissaries, without the full consent of my Aunt and Uncle, with whom I am under ob-

ligation to, such being the wishes of my Aunt and Uncle;" but of course, it is a duty if he should happen to meet him on the car or street, that he should bow, the same as he would to any gentleman that he should happen to meet, but he must avoid all conversation regarding family affairs or matters, in every sense of the word and that he will not ask Mr. Hammond for or get a loan of any description from him, in the way of money or anything else.

35 5th. As soon as I am settled in Washington, I will carry out the wishes of my Uncle Edward, "If after having my voice thoroughly tested by a proper teacher, am encouraged and advised to improve my voice, in the presence of my Aunt, if then my Uncle and Aunt should decide it would be for the best to fulfill my Uncle Edward's wishes, I will do so to the very best of my ability."

MOLYNEAUX TURNER."

On further cross-examination this witness was asked whether he recalled looking into the room where his Aunt Sally Woodbury was and saying to her "I wish your damned soul was in Hell," to which he replied that he had made no such remark, and to the question whether he had said to her "Shut up your damned mouth or you will get a tongue lashing," he answered that he did not. Whereupon the following occurred: "By Mr. Mattingly: I ask you if your Aunt was not a truthful woman. A. Yes, but I know of her stating something that I don't think was exactly truthful. Q. This is her handwriting, is it not (handing witness a paper)? A. Yes, this is her handwriting. Q. Look at the signature. A. Yes, that is her handwriting in ink. Q. A letter addressed to your uncle? A. Yes, sir, a letter address to William H. Turner. Q. In that part of the letter appears what I have asked you about? Mr. Darlington: I object. Mr. Mattingly: You object to his looking at it. Mr. Darlington: No, you asked him to say if that part of the letter is what you asked him. It is simply getting before the jury a matter which I submit would be entirely incompetent. The Court: Have you asked him a further question? Mr. Mattingly: Yes sir. The Court: I think that may be answered then. Mr. Darlington: Your Honor recalls that the question has been

36 asked him—— The Court: Yes, he has denied that matter Now he is shown a letter, after saying she was a truthful woman. Mr. Darlington: Say what? The Court: And he is asked to identify the statement contained in that letter. Mr. Darlington: To prove by him that the statement was made by his aunt? The Court: No: he is simply identifying that now for the purpose of asking a further question about it. Mr. Darlington: It is simply an indirect way of proving this statement in the letter. I submit it is incompetent. The Court: I think it is perhaps fair to the witness to refresh his memory about a matter of that kind before asking another question. I do not know what the next question will be, but I will allow it to come in. Mr. Darlington: I object to it on the ground that the contents of a letter written by the aunt

cannot be proved at all in this case unless the letter was brought to the attention of the witness in the aunt's life-time, and in some way connected with the caveator, and on the further ground that this is an incompetent way of proving the contents of a letter. Mr. Mattingly: I am asking whether certain statements made by his aunt are true or not. Mr. Darlington: He said that they were not true. The Court: That is as far as it goes. Mr. Darlington: He is asking him whether this letter does not contain the things he has asked him, as stated by his aunt. Mr. Mattingly: I wanted to satisfy him that it did, that is all. The Court: You may take the answer. By Mr. Mattingly. Now I will read this portion of
37 the letter I want to ask you about. Mr. Darlington: We object to that, further, on the ground that this is a letter purporting to be addressed to Wm. H. Turner, and without date. There is nothing to show it was ever sent to him, or anything about it. Mr. Mattingly: It is a statement made by his aunt as to his conduct, which I want to inquire about. The Court: Go on and take his answer."

To which ruling of the court the caveators, by their counsel, then and there duly excepted, and the court noted their said objection upon its minutes. Whereupon the counsel for the caveatees proceeded to read the said letter as follows:

"I cannot tell you what I have suffered the past year. I have done everything for his comfort referring to yourself and in return received only base ingratitude, insult and injury, until I fear he will do me personal harm. Last Sunday he was angered at some remark I made and he banged the door so that Harry (that is Harry her brother) thought they would be off their hinges. I was sick in bed. He looked into my room, his eyes popping out of his head like a raving maniac. You can judge of his condition by his language—'I wish your damned soul was in hell.' I will repeat but one other expression. It was too revolting—'Shut up your damned mouth or you will get a tongue lashing." You can judge the effect of such language upon an invalid."

Q. "Now do you mean that that statement by her is untrue? A. I don't remember making any such statement. I am not in the habit of using any such language." To which ruling of the court in overruling the objection of the caveators to the introduction of the said extract from the said letter, and to the reading of the same in the presence and hearing of the jury, the counsel for the caveators then and there excepted, upon the grounds above stated, which exception the court duly noted upon its minutes.

Whereupon the examination of the witness proceeded as follows:

"By Mr. Mattingly: Q. Look at that Doctor Turner (hand-
38 ing witness a paper). That is your Uncle Henry's handwriting? State whether you received a letter of which that is a copy. A. That is addressed to me, to "my nephew," but it is not dated, and I don't remember ever seeing it—"to my nephew M. Turner." I don't remember ever seeing it. Q. I did not ask you whether you ever saw that. Did you receive the original letter

similar to that? A. I don't think so. Q. Of which this is a copy? A. No sir, I don't remember receiving any letter containing those remarks. Q. Do you mean to say that you did not. A. I don't know when it was sent. I don't remember ever receiving any communication along those lines. Q. Your uncle claimed that your conduct to your aunt hastened her death, did he not? A. He never said that to me. Q. Do you not know that he did make that claim? Mr. Darlington: How could he? I object if the court please, unless some source of knowledge is pointed out. The Court: I think he may answer that question, if he has been informed of that in any way, whether it came to his knowledge. A. I never heard of his saying that my conduct toward my aunt Sally had hastended her death. By Mr. Mattingly: Do you know that he claimed—we are not weighing words you know—— Mr. Darlington: My objection goes to all this line. The Court: Yes. Mr. Mattingly: That your conduct was in part responsible for her illness and impaired her health, or anything to that effect? A. No sir; I never understood that my conduct impaired her health or was the cause of her illness. Q. Did you understand that your uncle claimed that such was the case? A. He never told me that at all, that her
39 death or her final illness was the result of any treatment I accorded her. Q. There is a statement here I notice by the Doctor two or three times that your aunt—— Mr. Darlington: One moment. What is that Mr. Mattingly. We do not know anything about it. Mr. Mattingly: I want to ask him about it. Mr. Darlington: You say "a statement by the doctor." Mr. Mattingly: Dr. Woodbury. Mr. Darlington: But what is the paper you are reading from. Nothing of that sort has been offered. Mr. Mattingly: No; he denies having received the letter, and I want to ask him as to some of the statements in the letter. Mr. Darlington: I submit your honor counsel has a perfect right to ask the witness about any statements he sees fit, but that it is not competent to ask him as to their being contained in some letter which is not in evidence. The court: I understood the witness to say that was in the doctor's handwriting. I do not know whether I misunderstood him or not. Mr. Darlington: Yes sir. Mr. Mattingly: It is the doctor's handwriting and signed by him. Mr. Darlington: The question is not only whether certain things are true, but carries with it the statement that these statements are in this letter. I submit that it is an incompetent way of getting at facts. Mr. Mattingly: It is a declaration by the doctor. By Mr. Mattingly: I will ask you this, whether on several occasions your aunt did not come to your relief when you had no money, and not a decent suit of clothes and no decent underwear. Mr. Darlington: I object to this as being irrelevant to any of the issues in this case. The
40 court: I think you may take an answer to that. Mr. Darlington: I reserve an exception. A. If she didn't come to my rescue on different occasions when I hadn't a decent suit of clothes? Q. Yes, and no decent underwear? A. No sir; I don't remember any such occasion.

To which ruling of the court in overruling the said objection on behalf of the caveators, and in permitting the said witness to be interrogated as to said statements contained in the said letter in the handwriting of the testator, the caveators, by their counsel, then and there excepted, which exception was duly noted on the minutes of the court.

Whereupon the witness on further cross-examination was interrogated as follows: "Q. Did somebody who took you in to board at their house in New York request you not to come in the front door, but to come in the basement door?" To which question the caveators objected on the ground that it was without any reference to the present case, even if it occurred. The court: "I cannot see anything in the question itself, but it may be preliminary to something else. Mr. Mattingly: Because his condition was such that he looked like a tramp, and she did not want her boarders to think she was entertaining tramps. Mr. Darlington: Suppose that were true, and happened in New York, what relevancy would it have here; and if it is preliminary to something else, ought we not to know what its bearing is before it is dumped into this case? Mr. Mattingly: It was just before his coming from New York here, and coming here in that condition. The court: What time was this. Mr. Darlington: I am trying to get my friend to give me some information
41 about it, but unsuccessfully. Mr. Mattingly: I do not know the date, your honor. He came here between June, 1900, and February, 1901. The court: I think he may answer on that statement. Mr. Darlington: We reserve an exception. A. I don't remember any such occasion—anybody telling me that I couldn't come in the front door."

To which ruling of the court in overruling the objection of the caveators and permitting the witness to be asked the said question and to be required to answer the same the caveators then and there excepted upon the grounds before indicated, which exception was duly noted on the minutes of the court.

Thereupon, upon his redirect examination, the said caveator, Molyneaux L. Turner testified that an agreement of October 18, 1896, which he admitted signing, had been prepared, as he believed, by Dr. Henry Woodbury; that witness had had nothing to do with its phraseology, that the testator had a dislike for hospital nurses, that a hospital nurse had called at the house to inquire about a patient in whom she was interested, that witness had had nothing to do with any hospital nurses, except professionally, at any time, or anywhere; that the witness was under no material obligations to his Aunt Sally in October, 1896, but had signed the agreement merely to humor them; that witness had never had any difficulty or trouble of any kind in his past life that the testator had objected to or discussed with him; that, after leaving the 12th Street Office and going to reside at the house of his Aunt Anna, he received an appointment as Assistant Demonstrator of Anatomy on the faculty of the Medical Department of the Georgetown University, which position he
42 resigned upon receiving an appointment in the Chemical Laboratory of the Agricultural Department, which inter-

fered with the hours at the medical school; that the only time he ever heard a charge that he had used disrespectful language to his aunt was on his cross-examination; that neither testator nor his aunt had ever brought such a charge to his attention during their lifetime, and that he had never heard them until at the trial; that this Aunt Sally had died of old age, chronic heart disease, chronic bronchitis and cancer, being them over seventy-five years of age—that, after going to his Aunt Anna's house, he visited the testator and his Aunt Sally, occasionally lunched and took dinner with them prior to the death of the latter, by their mutual invitation; and, on re-cross examination, he further testified that the position of Assistant Demonstrator of Anatomy was without salary.

Whereupon the caveatees, to maintain the issues upon their part joined, called as a witness Mrs. EMMA M. JOHNSON, who testified that she had known the testator for nearly 30 years, during part of which time he had been her attending physician, that, during the last 6 or 8 years of his life she had seen him perhaps once in every six months or so; and during his last illness she called at his house several times; that she last saw him about three weeks before his death; at his house they would usually speak of his profession, poetry, or something that was beautiful and interesting, whereupon the following ensued: "Q. Physically, what was his condition during the latter years of his life? A. During his latter years, after his accident, his
43 physical condition was impaired somewhat. His mental condition did not seem to be impaired at all. Mr. Darlington: I object on the ground that no foundation has been laid for an opinion on the subject, and I move to strike out the answer of the witness. The court: She is trying to describe what kind of a man he was. Mr. Darlington: Yes; but she is giving her opinion without any foundation, as we claim. Mr. Mattingly: She saw and talked with him, and exchanged visits with him. The court: I think that question is proper. Mr. Darlington: We note an exception. Mr. Mattingly: During the last three years of his life, Mrs. Johnson, did you notice any mental impairment at all. A. There was not. Mr. Darlington: I move to strike that out on the same ground." Objection overruled, and exception noted. "Q. During 1902-3-4 was he, in your opinion, capable of attending to business?", to which question the caveators, by their counsel, objected on the ground that no sufficient basis had been laid for the said question, and that the facts upon which witness based her opinion, if she had one, should be first adduced, but the court overruled the said objection, and directed the witness to answer "I think he was, he could direct," which answer the caveators moved the court to strike out on the same grounds as above stated, which motion was overruled, to which several rulings of the court, and to each of them, and to which several questions and answers of the witness, and each of them, the caveators severally excepted, which exceptions severally the court noted upon its minutes.

On cross-examination, this witness testified that she was not
44 sure that testator attended to any business after his accident, that he talked with her about his suit for the injuries re-

ceived, but that she did not recall anything he said, and that the last time he had spoken of it was when the suit was completed, and that she did not recall having heard him speak of any kind of business during the last 5 or 6 years of his life. Witness saw no difference in his mental condition from the beginning of her acquaintance to the last time she saw him a few weeks before his death.

Thereupon the caveators, by their counsel, moved the court to strike out each of the answers given by the witness upon her direct examination, as above set forth, upon the ground that it now further appeared that the witness did not state, and was unable to state, grounds rendering her competent to give an opinion as to testator's capacity to transact business, which motion was overruled by the court, and an exception to the court's said action was thereupon duly taken and allowed, and entered upon the court's minutes.

Thereupon Mrs. FOSTER CAUSEY, a witness called on behalf of the caveatees, testified that she had known testator all her life; that she had seen him three or four times during the last five years of his life, at his residence; that he had been the physician of witness' family; during the last five years of his life, had been a man of wonderful memory, especially for his home life in New Hampshire, would repeat at witness' request his own poetry, had a sweet voice and
45 would sing, whereupon she was asked on behalf of the caveatees the following question: "Q. From what you have seen of him, Mrs. Causey, as you have told us in your conversations with him, and visits to him, was he in your opinion in the latter three or four years of his life mentally capable of attending to business?, to which question the caveators, by their counsel, objected on the ground that no sufficient basis had been laid, but the court overruled the said objection, and permitted the witness to answer, "I should think so," to which ruling of the court and to the admission of the said testimony, caveators, by their counsel, then and there excepted, and the court noted the said exception on its minutes. Thereupon the witness was asked the further question: "Q. Did he give any indication to you on any of those occasions during the latter years of his life of any mental unsoundness?", to which question and to any answer thereto by the witness the caveators then and there objected upon the grounds before stated, and upon the additional ground that the question called for the opinion as to what were indications of mental unsoundness, but the said objection was overruled, and the witness was permitted to answer "No", to which ruling of the court and to the admission of which testimony the caveators duly excepted, and the said exception was duly noted on the minutes of the court. Thereupon, upon cross-examination, the witness testified that she thought the testator had never acted as their family physician since his accident, and that, if the accident occurred 25 years ago, she was too young to form any opinion as to his mental capacity at that time; that she had no personal
46 knowledge of any business transactions by him of any kind, that her first call upon him at his residence was about 9 months before his death, that neither she nor the preceding witness,

who was her mother, had visited the house until Mrs. Stevens went there, who had been a personal friend all witness' life; that all testator had said to her about his New Hampshire life was that, when witness spoke of having a friend by the name oc Woodbury, an old friend of her family, he had answered that there was a place called Woodbury in New Hampshire, and that he had been there.

Thereupon the caveatees produced as a witness in their behalf Mrs. LOUISA THOMPSON, who testified that she had met the testator the summer before his death, that she had seen him probably six times, that he generally spoke of his memories of the Civil War and *and* of witness' father, who was an army surgeon with the testator during that time, that he sometimes spoke of his home life as having been very happy and bright, but that he was left alone and drawing near his end. Whereupon she was asked "How was he mentally?" to which question, and to any answer thereto, the caveators then and there objected on the ground that no sufficient foundation had been laid, but the court overruled the said objection and permitted the witness to answer "Very clear in mind"; whereupon she was further asked "Did you notice any impairment of intellect at all?" to which question the caveators objected on the ground above stated, which objection, also, the court overruled, and permitted the witness to answer "No sir," to each of which rulings of the court the caveators then and there severally excepted, and their said exceptions were severally duly allowed, and entered upon the
47 minutes of the court. On cross-examination the witness testified that testator's talk was principally about memories of the Civil War and earlier times, that this was the burden of his talk, that he spoke of having had a happy home life, but the witness did know that he said it was always happy; that he did not mention anything about the members of his family—who they were; that he spoke of a nephew and of a brother he had had, but not very particularly; that all he had said about his nephew, witness thought, was that he had been forgetful of him of late years.

Thereupon DANIEL DUNCAN, a witness called on behalf of the caveatees, testified that he did not know testator, but that the will had been executed in his presence, and in that of the three subscribing witnesses who subscribed it in his presence and in the presence of each other, and that the first codicil, also, had been signed by the testator in his presence and in that of the other witnesses to that instrument, all of whom signed in the testator's presence, and in the presence of each other.

HARRY W. FINNEY, an attesting witness to the first and second codicils testified that he knew the testator by sight, that the testator had signed these two codicils in the presence of witness and the other attesting witnesses, and that they had signed it in his presence and in the presence of each other.

ALFRED B. LEET testified that he knew testator, had not seen him a great deal, remembers no conversation with him, but that testator had signed the two codicils in the presence of himself and the other witnesses, and that they had signed it in his presence and in
48 the presence of each other, that witness in his capacity of a notary public, had taken testator's acknowledgment to more than one paper at the offices of the American Security and Trust Company, where witness was employed.

Thereupon the execution by the testator of the will and of each of the several codicils in the presence of the attesting witnesses thereto, and their signatures in his presence and in the presence of each other was proven, and the said papers were offered and admitted in evidence as follows:

49 I Henry E. Woodbury, physician, of the City of Washington, in the District of Columbia, being of sound and disposing mind, and mindful of the uncertainty of life, do make and declare this to be my last will, hereby revoking all wills by me heretofore made.

1st. I hereby give, devise, and bequeath all of my estate and property, personal and real, as follows, that is to say, to the American Security and Trust Company, of Washington, in the District of Columbia,—

In Trust for the purposes hereinafter set fourth, and for no others to wit: Should my sister Sallie Woodbury survive me, The American Security and Trust Company, aforesaid, as Trustee, shall hold and manage all my property, collecting the rents, revenues, and income of the same,—making needed repairs on the real estate,—paying all taxes,—insurance, and for all improvements assessed against said property, reserving for their services, five per cent. of the gross income from the said property as per agreement, and the said American Security and Trust Company shall pay over the balance of the income, that is to say the net income of said property to my sister Sallie Woodbury, during her natural life, monthly or quarterly, as she may elect. At her decease, my said estate after the following bequests have been paid and satisfied, shall be disposed of as directed later on in this my last will.

HENRY E. WOODBURY.

2nd. I give, and bequeath, to my nephew Molyneaux Turner, a one fourth interest in house and premises numbered nine hundred and twelve (912) located on twelfth street Northwest, in
50 the City of Washington D. C. Said house was given by me to his grandmother Mary A. Woodbury, and is held by me now, as a Trust, by deed from her. This one fourth interest would have been the share of his mother, Margaret M. Turner, were she now living. I further give him the sum of one hundred dollars, and the gold watch in my drawer in

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the safe deposit Company. House and premises No. 912 Twelfth st. N. W. is to be sold as soon after my death, as it can be to ad-

vantage, and one fourth interest given my said nephew is to be paid him from the proceeds of said sale,—the balance of said proceeds of said sale to be paid by the Trustee, to my sister Sallie Woodbury.

The reasons for not remembering my nephew more generously,—are deliberate and decided,—he having forfeited all claim to my consideration, by his ingratitude and indifference ther-by embittering the closing years of my life.

3rd. I give to the Oak Hill Cemetery Company three hundred dollars, ($300.—) to be used in keeping my lot in the Cemetery in good condition.

4th. I give to my wife Anna L. Woodbury, the sum of ten dollars, she having been satisfactorily provided for

HENRY E. WOODBURY.

some years ago, out of my estate,—as per decree of the Equity Court of D. C. in the settlement of cause No. 2089, Equity Docket No. 10.

5th. I give to the Childrens Hospital of the District of
51 Columbia two hundred dollars, to endow two beds.

6th. I direct that my remains be cremated.

7th. After the expense of my funeral have been paid, and the legacies herein above enumerated have been paid and satisfied, I direct the American Security and Trust Company, Trustee, aforesaid, to pay over to the officers, or proper representatives of the Washington Home for Incurables as residuary legatee, all of the balance of my property personal and real, for the sole use, behoof, and benefit, of the said Washington Home for Incurables forever, said fund to be kept apart, and known as the Woodbury endowment, to the Home for Incurables. This final disposition of my estate is not to be made until after my sister Sallie Woodbury's decease.

8th. Should any party whatsoever, attempt to break this my last will, I direct my executors to spare no pains or expense,

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in defeating that purpose, and in having this my last will, sustained and established by the Courts.

I hereby designate, and appoint, my sister Sallie Woodbury, and The American Security and Trust Company, my executors, jointly, and

HENRY E. WOODBURY.

in case of my sisters death, The American Security and Trust Company shall act as sole executor of my estate, and of this my last will, under the direction of the Court.

In Witness whereof, I have hereunto set my hand and seal this the eleventh day of April in the year of Our Lord Nineteen hundred, and two. (1902)

HENRY E. WOODBURY. [SEAL.]

52 Signed and sealed in presence of

Signed, sealed, published, and declared, by the above named testator, Henry E. Woodbury, as and for his last will and testament, in the presence of us, who at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses this the eleventh day of April in the year of Our Lord Nineteen hundred and two.

Witnesses:

WM. A. McKENNEY,
1405 *G St. N. W., Washington, D. C.*
ALVIN O. PORTNER,
1104 *Vermont Ave., Washington, D. C.*
DANIEL DUNCAN,
1405 *G St. N. W., Washington, D. C.*

HENRY E. WOODBURY.

53 *Codicil.*

I, Henry E. Woodbury, physician, of the City of Washington, in the District of Columbia, do make and declare this as and for my Codicil to my last Will, bearing the date of April 11th, 1902. This codicil is not to effect my last Will in any respect save this. The bequests herein made are to be paid and satisfied same as the bequests in my last Will before the balance of my estate is

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conveyed by my Executor to the Home of Incurables of the District of Columbia as residuary Legatee, and chief beneficiary, absolutely and forever.

The making of this codicil was necessary in order to comply with certain requests of my dear sister Sallie Woodbury, who died Dec. 18th, 1902.

(1st.) I hereby give and bequeath to the Children's Hospital of the District of Columbia, Five hundred ($500) Dollars, by her request:

(2nd.) I hereby give and bequeath to her kind physician, Dr. Z. T. Sowers, for the Foundling Hospital of the District of Columbia, established by him, Five Hundred ($500) Dollars, by her request;

(3rd.) I hereby give and bequeath to Mrs. Emeline

HENRY E. WOODBURY.

A. Moore, a friend of my dear sister, Thirty ($30) Dollars;

(4th.) I hereby give and bequeath to my sister's faithful servant Bessie Gentry, Twenty-five ($25) Dollars;

54 (5th.) I hereby give and bequeath to Miss Emma Sophia McNeil, a good friend of my sister, Twenty-five ($25) Dollars;

(6th.) I hereby give and bequeath to my esteemed friend, Major Gilbert Thompson, at present of the U. S. Geological Survey, Fifty ($50) Dollars;

(7th.) I hereby give and bequeath to Mrs. R. W. Robison, of

No. 1507, U Street, N. W., a warm friend of my sister, Thirty ($30) Dollars;

(8th.) I hereby give and bequeath to Miss Ada Glassie, a young friend of my sister, Twenty-five ($25) Dollars;

(9th.) I hereby give and bequeath to my *my* friend

HENRY E. WOODBURY.

Dr. R. A. Foster, Twenty-five ($25) Dollars;

(10th.) I hereby direct that the American Security and Trust Company, of Washington, District of Columbia, my

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executor, shall receive and have from my estate, for their services, five (5%) per cent. of said estate;

In witness thereof, I have signed and sealed, and published and declared, this instrument as my codicil, at the City of Washington, in the District of Columbia.

HENRY E. WOODBURY. [SEAL.]

The said Henry E. Woodbury, at the City of Washington, in the District of Columbia, on said fifth day of January, 1903—signed and sealed this instrument, and published and declared the same, as and for his Codicil. And, we, at his request, and in the presence,
55 and in the presence of each other, have hereunto written our name-, as subscribing

HENRY E. WOODBURY.

Witnesses:

ALFRED B. LEET,
1405 *G St. N. W., Wash., D. C.*
DANIEL DUNCAN,
1405 *G St. N. W., Wash., D. C.*
HARRY W. FINNEY,
1405 *G St. N. W., Wash., D. C.*

HENRY E. WOODBURY.

Codicil No. 2.

I Henry E. Woodbury, physician, of the City of Washington, in the District of Columbia, do make and declare this, as, and for, my Codicil No. 2, to my last will, bearing the date of April 11th, 1902. This codicil is made, to revoke and annul a part of clause No. 2, in my last will, and to add a few bequests. It is not to effect my last will, in any other respect.

1st. I hereby revoke and annul that part of clause No. 2, in my will giving my nephew Molyneaux Turner, a one fourth (¼) interest in house and premises No. 912 Twelfth St. N. W. in Washington D. C. as I have purchased his interest in said property, as will appear by his deed of the same to me, bearing date October 30th 1903.

I deemed it best to do this so that there need be no forced sale of said property after my death, and so that

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my executor could transfer the same when desirable, without my nephews assistance.

2nd. I hereby give and bequeath to the Rev. Alfred Harding, for St. Pauls Episcopal church, one hundred dollars.

3rd. I hereby give, and bequeath, to the Episcopal hos-
56 pital in this city, one hundred dollars.

In witness thereof, I have signed, and sealed, and published, and declared this instrument, as my codicil Number two, at the city of Washington, in the District of Columbia, this the 30th day of October 1903.

HENRY E. WOODBURY. [SEAL.]

The said Henry E. Woodbury, at the City of Washington, in the District of Columbia, on the said thirtieth day of October 1903, signed and sealed this instrument, and published and declared the same, as, and for, his codicil number 2. And we at his request and in his presence, and in the presence of each other, have hereunto written our name- as subscribing witnesses.

WM. A. McKENNEY,
1405 *G St. N. W., Washington, D. C.*
ALFRED B. LEET.
1405 *G Street N. W., Wash., D. C.*

Codicil No. 2.

I, Henry E. Woodbury physician of the City of Washington in the District of Columbia do make and declare this as and for my Codicil No. 2, to my last will, bearing the date of April 11th 1902. This codicil is made to revoke, annul, and abrogate, a part of clause No. 2, in my last will, and to add a few bequests, also to request the Honorable Judge of Probate to make an order as to the destruction of certain papers, clippings, and documents after my death. It is not to affect my last will in any other respect.

1st. I hereby revoke and annul that part of clause No. 2 in my will giving my nephew Molyneaux Turner a one

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fourth interest in house and premises No. 912 Twelfth Street
57 N. W. in Washington D. C., as I have purchased his interest in said property as will appear by his deed of the same to me duly recorded and bearing date Oct. 30th 1903. I deemed it best to do this so that there need be no forced sale of said property after my death, and so that my executors could transfer the same when desirable, without my nephews

HENRY E. WOODBURY.

assistance.

No. 2. I hereby give and bequeath to the Rev. Alfred Harding for St. Pauls Episcopal church of Washington D. C. one hundred dollars.

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No. 3. I hereby give and bequeath to the Episcopal Hospital, in this city, one hundred dollars ($100).

No. 4. I hereby make the following request of the Hon. Judge of Probate for the District of Columbia. It is my earnest desire, that my housekeeper Miss M. M. Stevens, and my trusted friend Mr. S. H. Robeson, and his wife be permitted to occupy my house No. 2325 L St. N. W. as co-tenants paying no rent, for six months after my death. It is my wish that during that period my executor shall pay to Miss Stevens my housekeeper, out of the income of my estate, the sum of sixty dollars per month to supply the table.

My reason for making this request is, I have many papers, clippings, and documents, that I do not want to destroy while living, and I have given full instructions to the parties above named as to their disposition after my death. It is my wish that no relative of mine be allowed access to my house

HENRY E. WOODBURY.

58 or my papers after my death. I trust the Hon. Judge of Probate will issue the proper order on my executor for the purpose of carrying out this my dying request

In Witness thereof I have signed and sealed and published and declared this instrument as my Codicil No. 2 at the City of Washington in the District of Columbia, this 21st day of Dec. 1903

HENRY E. WOODBURY. [SEAL.]

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The said Henry E. Woodbury at the city of Washington, in the District of Columbia, on the said 21st day of Dec. 1903 signed and sealed this instrument, and published and declared the same, as and for, Codicil Number 2 and we at his request and in his presence, and in the presence of each other, have hereunto written our name- as subscribing witnesses.

Witnesses:

ALFRED B. LEET,
1405 *G St. N. W., Wash., D. C.*
HARRY W. FINNEY,
1405 *G St. N. W., Wash., D. C.*

Whereas I Henry E. Woodbury, physician, of the City of Washington, District of Columbia, have made and duly executed my last will and testament in writing, bearing date the 11th day of April, A. D. 1902, and two codicils thereto, one bearing date the 5th day of January A. D. 1903, the other bearing date the 21st day of December A. D. 1903, which said last will and testament and the codicils thereto, every clause, bequest and devise therein contained I do hereby ratify and confirm (except such clauses, bequests and devises therein contained as are hereinafter revoked and made void.)

59 and being desirous to alter some parts thereof, and of making additions thereto, do therefore hereby make this my codicil No. 3, which I will and direct shall be taken and held as part of my said will and testament, that is to say:—

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Whereas in clause number seven (7) in said last will and testament I did devise and bequeath the rest and residue of my estate both personal and real for the sole use behoof and benefit of the said Washington Home for Incurables forever, now I do hereby revoke said devise and bequest, and I do hereby devise and bequeath the said rest and residue of my estate both real and personal, share and share alike unto the Garfield Hospital of the District of

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Columbia and to the Children's Hospital of the District of Columbia, their successors and assigns forever. I hereby charge my Executor with the execution of this devise.

In witness whereof I have hereunto set my hand and affixed my seal to this the third Codicil to my last will and testament, this 18th day of February A. D. 1904.

HENRY E. WOODBURY. [SEAL.]

Signed, sealed, published and declared by Henry E. Woodbury, the above-named testator as and for a codicil to his last will and testament, in the presence of us, who at his request, in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

ANSON S. TAYLOR,
1405 *F St. N. W.*
HENRY F. BLOUNT,
1405 *G St.*

60 *Codicil Number* 4.

I Henry E. Woodbury M. D. of the City of Washington, in the District of Columbia, do make this my codicil number four hereby confirming my last will made on the eleventh day April, 1902 and all my former codicils so far as this codicil is consistent therewith and do hereby revoke and annul all of that part and portion of codicil number two authorizing Mr. S. H. Robeson and his wife to assist my nurse Miss Mena M. Stevens in destroying my letters and papers of no value after my death That is to be done by Miss Mena M. Stevens and the American Security and Trust Company my executor.

After my death the Robesons are to have nothing to do with my personal affairs.

In witness thereof I have signed and sealed and published and declared this instrument as my codicil number four at the city of Washington, in the District of Co-

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lumbia this the twentieth day of December 1904.

HENRY E. WOODBURY. [SEAL.]

The said Henry E. Woodbury of Washington, D. C. on said twentieth day of December signed and sealed this instrument and published and declared this as his codicil number four.

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And we at his request and in his presence and in the presence of each other have herein written our names as subscribing Witnesses:
Witnesses:
JOHN T. BARDROFF,
3416 17*th St. N. W., Wash., D. C.*
NETTIE BROWN,
211 *L St. N. W.*

61 Thereupon JOHN C. BARDROFF, called as a witness for caveatees, testified that he had been employed in the office of Mr. Shields, a real estate agent, who had charge of one piece of property belonging to the testator, and had very often carried the rent to the testator, at other times he used to see him to tell him of the condition of his property; on these occasions conversing with him about his property, his different houses, and on other topics and also made social calls; that witness could not remember just what they talked about; that they talked about the topics of the day, Masonry and the accident which had happened to the Doctor; whereupon the following question was asked him: "How was he mentally?", to which question the caveators then and there excepted, upon the ground that no sufficient basis had been laid to qualify the witness to give an opinion as to the mental condition and capacity of the testator, which objection was overruled by the court, and the witness directed to answer "His mental condition, so far as I know and observed was good. He was a very bright man." To which action of the court in overruling the caveators' said objection, and in permitting the said answer to be given, the caveators then and there duly excepted, which exception was allowed by the court, and duly entered upon its minutes.

Upon cross-examination, the witness testified that his acquaintance with testator began two or three years before his death, he could not recall any report he had made to testator about his property, or anything witness told him about it, or anything
62 that testator said to witness upon the subject, and that he could not recall any of the topics of the day testator had discussed with witness, either its substance or otherwise. Whereupon the caveators moved to strike out the testimony of the witness above recited in respect to his opinion as to the testator's mental capacity, upon the grounds of objection last above stated, and upon the ground that it was impossible that the jury should properly be guided by an opinion based upon so slender a foundation as that disclosed by the examination and cross-examination of the witness; but the court overruled the motion, stating "I think this a question of the weight of testimony for the jury," to which action of the court in overruling the said objection the caveators then and there excepted, which exception was allowed by the Court and duly entered upon its minutes.

Thereupon Mrs. MARGARET OSMUN, a witness called on behalf of the caveatees, testified that she had known the testator from 15 to 20 years; that he would call at her house quite often; that

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she had visited him every few weeks at his house after he became ill; that he would talk about himself, his sister, witness' mother, who was an old lady and an invalid of whom he was very fond, about the topics of the day, a great deal about his profession, and on various topics—about his insurance and his agents. Thereupon the witness was asked, "Did you notice at any time any impairment of his intellect?", to which question, and to any answer thereto the caveators objected on the grounds above stated, that no sufficient basis had been laid for the giving in evidence of an opinion
63 by this witness as to the mental capacity of testator, which objection was overruled, and the witness allowed to answer "No sir; his mind was clear;" when she was further asked "Was he competent, in your opinion, to execute a valid deed or contract," to which question, or any answer thereto, the caveators objected, upon the grounds set forth, but their objection was overruled, and the witness permitted to answer "I think he was competent in anything of that kind. I believe he was, he was competent to attend to business." To the court's action in overruling the caveators' objection to each of the foregoing questions and to the answers thereto, the caveators then and there duly excepted, each of which said exceptions was duly allowed by the court and entered upon its minutes. Thereupon, upon cross-examination, the witness testified that she could not recall or state any conversation she had had with *with* testator; that he had spoken of money affairs, and things of that sort, but she could not recall any, that she could not recall any of the topics of the day he had discussed with her nor anything he had said about his house; that he used to tell her about the repairs, but she could not remember anything he had said to her about them; whereupon caveators moved to strike out each of the above-recited answers of the witnesses, severally and separately, to which objection had been made and exception reserved on direct examination, on the ground that it further and more fully appeared that no proper basis had been given, or was able to be given
64 by the witness to make her opinion as to testator's mental capacity competent, but the court overruled each and every of the said motions, to which action of the court in respect to each and every of them the caveators then and there duly excepted, which exceptions were severally allowed by the court and entered upon its minutes.

Thereupon Dr. N. S. GRAHAM, a physician and witness called on behalf of the caveatees, testified that he had attended the testator professionally in May or June, 1904; had found him suffering from chronic bronchitis; that he saw him once in a while from that time to his death in January, 1905, probably 15 or 20 times altogether; that testator discussed his condition with witness, using medical terms applicable to that condition with correctness, and that witness noticed no symptoms of mental unsoundness. On cross-examination the witness testified that the only medical term used by testator that he recalled was "chronic bronchitis;" that it is very

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difficult to tell from casual visits, such as witness made, whether a man has monomania; that he thinks it would have cropped out in that time, but that it might not have done so, and in this case he noticed nothing of the kind, and that witness talked with him only about his illness.

Dr. FOSTER, a further witness called on behalf of the caveatees, testified that he had been a medical student under testator in 1871; that he had been a physician but for last ten years had been in War Dept., that he saw him again after the Spanish War about once a month; that they conversed on the topics of the day,
65 sometimes on cases the testator had had years before, that he saw nothing to intimate want of capacity mentally, was well preserved for his age, and that he was capable of executing a valid deed or contract. On cross-examination this witness testified that he, himself, had discontinued active practice about ten years ago, becoming an examiner in the War Department; that testator had called at the War Department in 1898 about once a month, asking about his nephew, with whom the witness corresponded; that witness had continued to see him about once a month during months until his death; that they discussed the topics of the day, come private matters, nothing else that witness recalls.

Dr. Z. T. SOWERS, a physician called on behalf of the caveatees, testified that he had attended testator for a number of years, continuing until about a year before his death, seeing him about two or three times a week during his illnesses; that he was quite feeble, had chronic bronchitis, chronic sciatica, and in a generally miserable condition, but that his mental condition was clear—an unusually bright man—and that witness noticed no impairment of his intellectual faculties; that he frequently told witness he had practically disinherited his nephew, that he was sure the latter would contest his will, and wanted witness to testify to his ability to make it, and his intention to disinherit him, and that in witness' opinion he was of sound mind and capable of executing a valid deed or contract. On cross-examination, witness testified that he became acquainted with testator's nephew, Dr. Turner, after his
66 return from the Spanish War, that he had known him very well since that time; that Sally Woodbury died of bronchial *ph*eumonia, general debility and angina pectoris; that testator's complaints against his nephew*s* were that the latter had made demands for money, that to these demands responses had to be small, and that his nephew was dissatisfied and expressed his dissatisfaction by unbearable language and conduct; that it is sometimes difficult to tell whether a man is suffering from delusions, though witness cannot think that in this case the nephew made no demands, and that there had been no differences between the testator and the nephew of that character; that, if the testator imagined his nephew had been living in tramp boarding houses when he had not been doing so, this would change witness' view as to his

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mental condition, unless the testator had been misinformed; witness would rather think he had misused the word; that if testator had said he had gone to New York and taken his nephew out of such a place and brought him here, and these things had never occurred, this would affect his opinion not as to his mental capacity, bus at to his veracity, and that, from his knowledge of testator, he would not believe that he would tell a falsehood, or that he was suffering from a delusion.

Dr. HENRY DEALE, another physician called as a witness for the caveatees, testified that he had attended the testator for about two months early in the year 1904, that their conversation had been principally about medical matters; also other matters, his patriotic society; that his physical condition was very poor, his mental
67 condition perfectly sound, that witness did not notice any indications of impairment, and was of opinion that he was of sound mind, capable of executing a valid deed or contract. On cross-examination this witness testified that it is frequently no doubt difficult to determine a man's mental condition, even when trying to do so; that it is not unusual to be perfectly sound on some subjects, and unsound on others, that testator would speak of his nephew, but said nothing explicit about him, but gave witness the impression that he felt bitter towards him.

Thereupon GILBERT THOMPSON, a witness called on behalf of the caveatees, testified that he had been an intimate friend of the testator since 1868, seeing him at intervals from that time until his death; that a distinguished trait of the Woodbury family was its closeness in friendship for its members; that testator wrote some very fine poetry and was a man of more than ordinary attainments, that they discussed business, topics of the day, etc., medical subjects of which doctor was fond; that witness saw no impairment of his mind for a moment, that he was quick to change from one subject to another, that his will was strong, was glad to hear Miss Stevens' opinion but had a will of his own, that he told witness he had practically disowned his nephew, had tried to do all he could for him; that he had found him in New York, purchasing clothing, brought him here, tried to start him in his profession and gave him an office; that he had no visible means of support in New York, and was living around there in a haphazard way at tramp boarding houses; that he had shown ingratitude; that witness last
68 saw him on New Year's day, two weeks before his death, when he seemed just the same as ever, that in witness' opinion he was sound mentally and capable of executing a valid deed or contract; that witness would have been perfectly confident in taking prescriptions from him from the time he first knew him until the time of his death.

On cross-examination, witness testified that since his accident, about 25 years ago, testator had not practiced medicine; that he had never told witness why; that on one occasion, he requested the witness to get leave from the Department to go with him to the offices

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of the American Security and Trust Company; that witness got excused from his place of business in the Government Geological Department and went to the office of the Trust Company, when the testator showed him his box in the safe deposit vault of the Company, containing family relics and jewelry and papers which the testator did not show him in any way to give him any knowledge of their character or contents, and which he did not examine; that testator said he wanted witness to come there and see his box because he wanted witness to know something about his business, and that the American Security and Trust Company was to be his executor; that witness did not ask him why he wanted witness to go there or to look at the box, but witness thought he wished him to watch the Company, and see that it did its duty, although testator did not say this; testator did tell witness Trust Co. had his deeds, will, and stocks, but no further information about them; that, during the Spanish War, testator had spoken to witness about his nephew's quick abilities in obtaining something to do, and had spoken
69 well of him; that he first heard him speak unkindly of him after the death of his sister Sally Woodbury, and shortly before Miss Stevens came to live at the house, and that he had shown witness a list of his rules of conduct for his nephew's life, and complained that his nephew had not responded to his efforts to help him in his medical career, but witness did not remember any of them.

The caveatees thereupon gave other evidence tending to prove that the testator attended to his own business affairs, that he made contracts with painters, plumbers and other workmen, up to and including the last year of his life, for making repairs upon his properties, taking estimates from them, awarding contracts, and paying bills; that in the last years of his life he gave orders for the purchase of Washington Gas Light Company's stock, and paid the amount of the purchase money of these several orders by his own checks drawn in his own handwriting; that he had taken drafts of these instruments to the attorney and trust officer of the American Security and Trust Company, talked with him about them, received his suggestions, taking the drafts away, and then brought them back in the condition in which they were now, executing them in the manner described by the attesting witnesses above set forth; that said attorney had advised him against the provision making certain requests of the Probate Judge, and had informed him that the things he had requested were within the province of the executors, not of the Judge, but that testator had nevertheless inserted that provision in the final draft, and that, in the opinion of the witnesses on behalf of the caveatees generally, the testator was of sound and dis-
70 posing mind, capable of executing a valid deed or contract.

MENA M. STEVENS, a witness called on behalf of the caveatees, testified that she had known testator since 1868, that she came to the testators house the last part of December, 1902, in response to a letter from testator asking her to come; that she was a nurse, and went as housekeeper and nurse, that she had nothing to do with

the preparation of the wills or codicils; that, after she had been at his house a few weeks, he asked her if she preferred to have him pay her a salary, or to have him pay her in his own way, and that she left it entirely with him; that he did not ask her advice in any way about his will or codicils; that he told her that he had disinherited his nephew, as his aunt and uncle had done, that he was going to leave his property to charity; that his nephew had not treated him as he should have done and did not appreciate what they wanted to do for him; that he told her that he had desired to teach him business methods, book-keeping, banking, the writing of deeds, &c.; that he had given him 75¢ a week to spend, and he had wanted him to write in that little book just what he had bought with it, and when he had used it to let him know, and that this was done only to teach him business; that from the time witness went to the house until his death, the testator's mind continued perfectly sound, but suffered from weakness of heart, chronic bronchitis, and bad cough, but was out attending to business until a few days before he took to his bed, remaining very methodical; that she had never known a man or woman who had a stronger will; that he knew that witness knew better than he did what to do for him, so far as
71 profession of nurse was concerned, and never interfered, but if she undertook to go beyond that, or to dictate, she was silenced very quickly; that in Forest Glen she did not treat him as a mother would a child, but did treat him as a nurse does a patient; that she noticed no impairment of his mental condition up to the time of his death; that he could have executed any papers on the day before death, except for physical weakness. On cross-examination, this witness testified that she had nursed for testator before she left Washington for New York in 1886, but not after he had retired from practice; that she had not seen him often between 1886 and the time of her coming to his house in 1902; that she had noticed no mental impairment before she left Washington in 1886; that she knew of his intention to make one or two of the codicils, but had nothing to do with the making of any of them; that one or two things excited him, mostly his nephew; that she noticed this when she first came, and that whenever he talked about his nephew much he got a little excited; that he was not worried about financial matters as a rule in 1904, but was so once or twice because he thought he was going beyond his income, but was not excited about it, but talked sometimes a good deal about his expenses, and would say he would have to be economical; that witness could not say how much money he furnished her to run the house with; she never kept any account of it; that once or twice he was not in a condition to talk business with people who came to the house, she did not remember the time, or who the people were, but it was
72 probably in the last summer of his life; that the Columbia Street house, a conveyance of which by him to her was recorded after his death, rents for $21.90 per month; that he gave her 35 shares of gas stock at different times; she can't say when the first or last were given; that he gave her some in 1903; that she can't say how long before his death the last gifts were made, or how much

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it was, or whether most of it was given in 1903 or 1904; that she had no stocks except what he gave her, and he knew it; that he knew she had given up her New York home, where she was receiving an income for keeping her brother-in-law's house; that this income was about $8.00 per month; that he first have the deed conveying the Columbia Street house to her to Col. Blount, to be given witness, or recorded after his death, that he subsequently took it back from Blount, then lost it; that he and witness hunted all over the house to find it, but could not; that he was a man of very methodical business habits; that the subsequent conveyance of this property was then prepared, and given to Col. Blount to keep until testator's death, the witness not to have the property until after testator's death; that witness does not know how much stock he had given her before she knew of this deed; can't say whether he gave her any during the last seven months of his life; that the stock given her is now in New York, in the custody of her nephew; that she knows the handwriting of testator; that the signature to a paper produced and submitted to her by the caveators for examination was, to the best of her knowledge, in the testator's handwriting, being in the following words and figures:

73 "I place in the hands of my friend S. H. Robison the deed I executed to Mena Stevens for the following purposes and no other, to wit: he will hold subject to my orders while I live and in case of my death he will ascertain if possible what dividends from stocks and bonds she receives, and if the amount reaches sixteen dollars per month, then he is to destroy the deed, and it is to be of no effect.

May 27th, 1904.

HENRY E. WOODBURY."

The said witness, MENA M. STEVENS, further testified that she first knew the testator's nephew as a small boy at his house, and that she next saw him before she went to testator's house to live, as above stated; that testator's said nephew continued to come occasionally to the house to visit testator until New Year's Day, 1904; that she never had any conversation with him, nor differences, disputes or the like; that he never did her an injury; that she does not know that she felt very friendly towards him; that she did not feel unfriendly on her own account; that she did not know, had no recollection of telling Bessie Gentry several months before the latter left the testator's house that she hated the nephew—she is not able to state positively whether she so told her or not, or that the nephew would not be mentioned in the will, and that he could not come into the house after the testator's death, Bessie Gentry heard Dr. Woodbury say it, may have said it herself, that she may have said these things; that she does not remember whether she talked unkindly in the presence of the witness Whitcraft until the testator asked her to discontinue doing it; that testator said he had left Dr. Turner $100. same as his brother and sister; his nephew had never had any liking

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for the Woodburys, and that he could not get him to do
74 as he wanted; that she now has 33 shares of Washington Gas Company's stock and two $100.00 Gas Company Certificates of indebtedness, all of which was given her by the testator after she came there as his housekeeper and nurse; that these shares of stock paid eight per centum per annum on their par value of $20. which was $50.00 each year.

Whereupon by leave of Court, caveatees offered in evidence a deed from Henry E. Woodbury and Anna L. Woodbury his wife, in Dr. Woodbury's handwriting, to the American Security and Trust — whereby the parties of the first part, in consideration of one dollar, conveyed to the said American Security & Trust Company, the following described lots, lands and real estate situate in the City of Washington, D. C., "to wit: All of the following parcels of land and premises known and designated as part of Lot C, in Square No. 285, the same being house and premises No. 912 Twelfth Street, N. W., also Lot and premises, South 5 Square 365, the same being house and premises No. 1535 Columbia Street, N. W., also Lot South 31 Square 693, being house and premises No. 421 New Jersey Avenue, S. E., and Lot south of 5 Square 37, the same being house and premises No. 2325 L Street, N. W.

"Together with all and singular, the improvements thereon, and all the rights, ways, easements, privileges, advantages, and appurtenances thereto belonging, or in any wise thereto appertaining.

"In trust; nevertheless for the following purposes, and no others
To wit:
75 "The said American Security and Trust Company shall hold the several pieces, parcels and lots of land, and real estate as Trustee, Henry E. Woodbury, of the party of the first part, to have all of the rents, profits, and emoluments of the same, during his life, and after the death of the said Henry E. Woodbury, of the first part, the said American Security and Trust Co. party of the second part shall transfer, convey, and dispose of the said lots, land, and real estate in accordance with the terms, directions, and wishes, of the said Henry E. Woodbury of the first part, as set forth fully and explicitly, in his last will, bearing date April 11th, 1902, said Trust Co. being executor, unless ordered, and directed by the said Henry E. Woodbury to convey and transfer the same, or any part thereof, to other parties, before his death," said conveyance being signed and duly acknowledged by the grantors before A. S. Taylor, notary public.

Thereupon the caveatees offered in evidence a contract or agreement between the testator and Anna L. Woodbury, his wife, dated July 1, 1887, to which caveators objected on the ground that they had not been allowed to introduce evidence of a like character, or upon the subject matter of the testator's relations with his wife, on the ground that it was too remote, whereupon caveatees, by their counsel, stated that the agreement was offered as explanatory of some evidence on behalf of the caveators stating that the testator had spoken of himself as being a widower, and having been di-
76 vorced from his wife, to which counsel for the caveators objected that the paper of July 1, 1887, submitted to the court

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for examination, did not tend to show either divorce or that the testator was a widower.

Whereupon the following ensued:

"Mr. MATTINGLY: I think I have a right to it now as a part of the case in connection with the question brought out in the course of the testimony as to the fact that they had been separated. The court: I think it may be competent to explain the situation here, and I will admit it. Mr. Darlington: We object particularly because we were precluded from showing his condition and characteristics at that time, and were not allowed to take the wife's deposition because it was too remote. The court: But you took it. Mr. Darlington: Only with regard to the recent deed made in 1903, expressly reserving it on the other ground, because we could not go back of that. Mr. Mattingly: They offered it in evidence, you will remember, a petition filed by Dr. Woodbury for divorce, and your Honor said that was too remote, and that you would not try that case over here. The offer was to take Mrs. Woodbury's deposition to prove that his statement in that petition was false. Mr. Darlington: Yes, and to trace his condition and status from that time down to this. His Honor said those transactions were too remote. We would not care anything about this paper if we could show *as* could have the origin of the trouble and its continuation down through these years, to the time this paper was signed. The court: I do not think that part of it is important. The question of the contract relations, or
77 what the doctor might have thought of those relations, is not of importance here. Inasmuch as you have two contradictory statements from him I think this may come in in response to that. Mr. Darlington: There is nothing in this paper that touches any contradictory statement I have offered, and we reserve our exception. Mr. Mattingly: We have a right to show the relations existing between Dr. Woodbury and members of his family. Mr. Darlington: I want to get this straight. The relations between the doctor and his wife began about 1870, about 17 years before this paper was made. Counsel wants to show by this paper, written in 1887, what the relations were then, we not being permitted to show how they originated, and the circumstances which continued down to this date. We think it is improper, and I therefore state my grounds for it. The court: Read the paper if you want to."

To which ruling of the court, and to the admission of the said paper in evidence the caveators then and there duly excepted upon the grounds above set forth, and the court noted their said exception upon its minutes, whereupon the said paper was read to the jury as follows:

"This agreement made this first day of July, in the year of our Lord eighteen hundred and eighty seven, by and between Anna L. Woodbury and Henry E. Woodbury, her husband, both of the city of Washington, in the District of Columbia.

"Witnesseth: That, whereas the said Anna L. Woodbury is seized and possessed of certain lands and real estate in her own right in the City of Washington, D. C., and Cambridge, Mass.; and
78 whereas the said Anna L. Woodbury desires to be able to sell, dispose of and convey the same as she could were she a *femme*

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sole; and whereas she is unable to do so unless by and with and consent and agreement of her said husband aforesaid, Henry E. Woodbury;

"Now, therefore, it is agreed by these presents that the said Henry E. Woodbury will permit the said Anna L. Woodbury to sell, dispose of and convey any and all of her real estate as at any time she may desire to do: and in consideration of this relinquishment of all right, title, interest and claim of him, the said Henry E. Woodbury, in and to, the property and lands of the said Anna L. Woodbury, the said Anna L. Woodbury hereby covenants and agrees for herself, her heirs and assigns, to relinquish all and every right, title, interest and claim that she (or they through her) may have to any and to all of the property personal or real that the said Henry E. Woodbury possesses now or may hereafter acquire, together with her right of dower in any estate the said Henry E. Woodbury may leave in case of his demise. And she the said Anna L. Woodbury further covenants and agrees with the said Henry E. Woodbury, that under no circumstances will the said Anna L. Woodbury as — for, demand or claim from him alimony or a support for any time past, present, or to come.

"In short this covenant and agreement is intended to restore to each of the aforesaid parties—Anna L. Woodbury and Henry E. Woodbury—the same right to contract, to use or to dispose of their respective properties, lands and estates—personal and real—
79 as they possessed before they were married.

"In testimony whereof the said parties have hereunto set their hands and affixed their seals this First day of July in the year of our Lord one thousand eight hundred and eighty-seven.

ANNA L. WOODBURY. [SEAL.]
HENRY E. WOODBURY. [SEAL.]

Witness:
HENRY C. STEWART, JR.
H. CLAY STEWART.

"DISTRICT OF COLUMBIA, *County of Washington, ss:*

Personally appeared before me Henry C. Stewart, Jr., a Notary Public in and for the City of Washington, District of Columbia, Anna L. Woodbury and Henry E. Woodbury, known to me as the parties to the above agreement; and they declared the same to be their voluntary act and deed, for the intents and purposes therein set forth.

"Given under my hand and Notarial seal this First day of July, A. D. 1887.

HENRY C. STEWART, JR.,
Notary Public."

Mr. DARLINGTON: When was this recorded? Mr. Mattingly: Recorded March 19, 1903.

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Thereupon Rev. E. M. THOMPSON, a witness called on behalf of the caveatees, testified that he was the Assistant Rector of
80 St. Paul's Church, of which the testator became a member, about two years before his death; that witness visited him during the summer months, during the summer of 1903 and 1904; that the subjects of conversation would be of a various character, sometimes about his physical condition, sometimes his literary attainments and accomplishments, and sometimes his own private affairs; that as witness first knew him he was going around and seemed to be quite active, but in the last year of his life witness thought he was in bed most of the time, whereupon the following ensued: "Q. How was his mental condition? Mr. Darlington: I Object. As yet we have had no data upon which to base an opinion. No conversation has been given? The court: Ask him to describe his mental condition if he can. Mr. Darlington: That is to give an opinion as to mental condition. The rule is that before that can be done the witness must give facts. The court: He has stated his conversations with him on various subjects. Mr. Darlington: He has stated none of them. The court: I think, if he can describe what he saw about him that gave him any opinion, he may do it. Mr. Darlington: The Supreme Court of the United States in the case of Charles Hauptman has said that it is incompetent for a lay witness to testify as to mental condition from what he saw and knew of him, unless he details the facts upon which he bases his opinion. The Court: It may be this will draw out the details. Mr. Darlington: Unless the details are given he is incompetent to state it. The court: I think the question is proper. He is asked to describe his mental condition. Mr. Darlington: Your honor will allow
81 me an exception. The court: Yes. The witness: A. I think he was sound. Mr. Darlington: I move to strike out the answer on the ground I have stated. The court: He is giving his opinion now. Mr. Darlington: Yes; it seems to me that is only what the question calls for. The court: I think I will let the answer stand. To each of which rulings of the court severally in allowing the witness to testify as to his opinion as to the mental condition of the testator, over the caveators' objection, and in overruling the caveators' motion to strike out the said answer of the witness, the caveators duly excepted, which exceptions, severally, were by the court allowed and noted upon its minutes.

The witness thereupon further testified that the testator had spoken of some papers he had written and read before medical societies, and of some of his own particular views upon those subjects and of the commendation with which these papers were received by the listeners; that he was very fond of reciting poetry by noted authors and his own poetry; that he had talked with witness about his physical condition, whereupon the following ensued: "By Mr. Mattingly: Did you notice, at any time during your visits to him, any indication of impairment of intellect?" to which question the caveators, by their counsel, then and there objected on the ground that no sufficient foundation had been laid as to said witness's qualification to answer the said question, but the court overruled the said

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objection, and permitted the witness to answer "No sir;" to which ruling of the court in overruling the said objection, and in
82 permitting the said answer to be given, the caveators then and there duly excepted, and their said exception was allowed by the court and duly entered upon its minutes.

Thereupon, on cross-examination, this witness gave testimony tending to prove that the testator was confirmed as a member of the said Church in or about Easter 1902; that the testator lived about two summers after that; that he does not remember that he saw anything of testator during the first of these two summers, that he does not remember whether the testator was not absent from the city the whole of that summer; that he remembers no interviews or conversations with him during the summer of 1903; that he had never studied medicine, and, although the views upon medical subjects expressed by the testator seemed to be reasonable, he knew nothing about them, except what he had heard as a layman; that he did not know, as a matter of fact, whether the testator had read any papers before medical societies; that he told him he had read them; that he does not remember whether he told him he had read them 25 years before he knew him, that it seems to witness more recent than that; that he does not recall the date at all; that he does not know whether testator's views were commended by medical men or not; whereupon caveators, by their counsel, renewed their motion to strike out the testimony of this witness excepted to as above noted, upon the grounds before stated, which motion of the caveators the court overruled whereupon the caveators excepted and the court allowed their said exception and noted the same upon its minutes.

Thereupon caveatees offered evidence tending to prove that the testator's real estate consisted of house #2325 L Street, as-
83 sessed for taxation at $3,202.00; #912 12th Street, assessed for taxation at $5,727.00, and renting, with its stable, for $42.50, and #421 New Jersey Avenue, assessed for taxation at $3,775.00, and renting for $30. a month, the total assessed value of the real estate, exclusive of the Columbia Street house, conveyed by the testator to Mena M. Stevens, being $12,704.00; and that his personal property consisted of twenty shares of the Capital Traction Company of the market value of $2,920.00; seven and a half shares of Washington Railway and Electric Company, of the market value of $683.75; one hundred and sixty-four shares of the stock of the Washington Gas Light Company, of the par value of $20.00 per share, and of the market value of $10,004.00; two certificates of the Washington Gas Light Company, aggregating $3,220.00; three certificates of the Metropolitan Railroad Company aggregating $2,321.57, making the total estimated value of the personal property $19,145.32, and making the total valu*d* of the estate $32,000.00, taking the real estate at its assessed value.

In connection with the reasons for admitting the testimony as to the trial in 1885, Mr. Darlington said, upon point of connecting it with time of will, 17 years later, "I will say frankly to your Honor that the testimony we have already offered of Miss Arnold is per-

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haps the strongest we have on that subject. It will show that certainly, for ten years before this will was made, this condition continued."

Dr. MOLYNEAUX TURNER further testified on behalf of the caveators that in the fall of 1893, after graduating in medicine, he went to the infants' hospital near New York, as an interne, re-
84 maining there six months without pay; then entered the employ of the Netherlands Line as steamship surgeon, remaining with that line for about a year at a salary of $50. a month and expenses; witness then opened an office in the City of New York, for the practice of medicine, but closed it and came to Washington in January, 1896, at the request of the testator, on account of his Uncle Edward's health, residing with the testator until August of that year, when he entered the staff of the Emergency Hospital; witness remained on that staff one year, receiving during the last four months thereof, $25. a month, room and board; about two months later, in November 1897, witness went with the Panama Canal and continued in that employment, as medical officer, until the Summer of 1898, at a salary of $50. a month, quarters and food; in the Fall of 1898, witness took the examination, and was appointed Assistant Surgeon in the Army and served in that capacity until June 30, 1900, at a salary of $150. a month and perquisites, witness then went to New York, living there with his father and stepmother until February 1901, when he came to Washington, on the invitation of his Uncle and Aunt, and lived with them until August, 1901; when at the invitation of Mrs. Henry Woodbury, he went to live with her, and has lived there ever since; witness' Uncle and Aunt were desirous that he should stay with them, and established himself in the practice of medicine, but witness regarded being with corporations as being a stepping stone and method of establishing himself in the practice of medicine; since 1901, witness has been particularly engaged in looking after his Aunt's affairs; has
85 acted as Treasurer and member of the Board of Directors of the Mining Company in which he and his Aunt held stock, but has received no salary for such services, has had no regular office for the practice of medicine, but has used the office of this Mining Company, has had no sign out as physician, but would give out cards to his friends; witness is now employed as clerk in the Laboratory of the Department of Agriculture.

Thereupon Dr. ALFRED HARDING, a witness produced on behalf of the caveatees, testified that he is the rector of St. Paul's Church, of which testator was a communicant, that he knew testator intimately for the three years prior to his death; that testator was a very cultivated man, talked about literary matters and poetry, and was a pleasant man to talk to, although deaf in his later years; was deeply interested in his profession, and liked to keep up with it; a man with a strong sense of justice and right; witness prepared him for confirmation, and after that he was much interested in the

church, and talked about it with witness; he was mentally a strong man. Testator sent witness the following poem which he wrote in 1904, and which witness published in the parish papers:

"My Last Prayer:

When the broad sunlight of life's day is closing
And shadows gather round,
And my frail skiff approaches that fair Haven,
Where peace and rest are found,
Oh Father hear Thy feeble child's petition,
Be Thou his steadfast stay,
Comfort, keep and bless him and conduct him,
Into the perfect day.
And in Thy house of many mansions lovely,
All earthly trials o'er,
Restore him to his loved ones parted from him,
To leave him never more.

HENRY E. WOODBURY.

November 23, 1904."

86 Witness did not notice any impairment of testator's intellectual powers and considered him capable of attending to business; on cross-examination, witness further testified that the only business transactions he knew the testator to transact were, testator became a subscriber toward the support of the church, and was very particular to see that that pledge was fulfilled; and he thought he paid his pledge quarterly, but was not positive about this, but that the witness, without passing on the business capacity of men who did not pay their subscriptions to the church, considered their payment as an indication of business capacity on the part of those who did, and that testator was confirmed about Easter 1903. Witness considered him a conscientious, truthful man.

87 CHARLES J. SHIELDS, a witness called on behalf of caveatees, testified that he knew the testator for five or six years before his death, and for the last three years before his death, was agent for his house No. 421 New Jersey Ave. Southeast; he first talked with testator about stock he was interested in, and later talked with him about tenants and troubles with his house and repairs; it was after this that testator turned over the house to witness to rent. Witness again saw him two or three times a month at first, later once or twice in three or four months, until about six months before his death, when he saw him more frequently at his home; spoke with him on a variety of subjects, after the business in hand was disposed of;

And thereupon the following ensued:

Q. How was he mentally? A. I think his mind——

Mr. DARLINGTON: I object on the ground that so far the wit-

ness has given us no conversation and no transactions, sufficient to base an opinion upon.

Mr. MATTINGLY: He has stated the subject-matter of the conversation.

Mr. DARLINGTON: You cannot tell by saying what a man talks about, anything about his mental condition, as we claim.

Mr. MATTINGLY: I think we have laid a sufficient founda-
88 tion to ask what sort of a man he was mentally. I have already asked him about his business matters.

The COURT: Describe, if you can, the kind of a man he was mentally.

Mr. DARLINGTON: I object to that as being an incompetent question at any stage of the case, for a non-technical man or a layman. As I understand the rule it is not competent for a layman to describe the kind of mind a man has, without laying a proper foundation.

The COURT: The rule, as I understand it, is that you cannot give your opinion as to whether a man is of sound mind without you state the circumstances you have described concerning him or concerning some peculiarities about him or some lack of peculiarities —some conversations you have had with him. But where you are going to describe a man, you are simply describing what sort of a man he was, and not raising any question of soundness or unsoundness of mind.

Mr. DARLINGTON: To describe the mind is nothing more than an opinion about the condition of the mind, which we submit is incompetent. You cannot describe mind without giving your opinion of that mind, which we think is incompetent for a lay witness to do, especially until he has given facts and circumstances showing upon what he bases his opinion, so that the jury can judge whether the basis is sufficient or not.

The COURT: I think he may answer the question.

Mr. DARLINGTON: We take an exception.

89 By Mr. MATTINGLY:

Q. Describe what kind of man he was mentally? A. I think he was a man of perfectly clear mind.

Mr. DARLINGTON: We object to the answer and move to strike it out on the same grounds.

The COURT: The motion is overruled.

Thereupon witness further testifies; testator had a good idea of business details, and the details of the house that witness had charge of; witness noticed no impairment of intellect, and considered him of sound mind and capable of executing a valid deed or contract; on cross-examination, witness further stated that his only business connection with the testator was the *the* renting of the house for him.

JOHN PAUL EARNEST, a witness called on behalf of the caveatees testified that he was a member of the bar and became acquainted with the testator at a meeting of the Sons of the American Revolution in 1895 or 1896; that he met him at these meetings year after year, and almost always talked with him, usually upon patriotic subjects, of which the latter was very fond; shortly after witness's election as President of the Society in February 1904, at the request of the testator, he went to his house to see him, had a lengthy conversation with him about a picture of some ancestor of his,
90 which he wished the Society to have after his death; testator said he had no relations but his nephew, who was a rascally fellow, with whom he would have nothing to do; witness considered testator to be perfectly sound and rational, and capable of executing a valid deed or contract; on cross-examination, witness further testified that he is only informed about questions of mental insanity in a general way as lawyers are; that between 1896 and 1900, and he thought about 1899, testator read a paper before a meeting of the Sons of the American Revolution, which was received with applause; that the testator had requested leave to read the paper, that witness arranged it for him, and that he did not know when the paper had been prepared, and that the testator did not tell witness what means he had employed to have the picture go to the Sons after his death, but that witness knew some means were necessary.

LOUIS A. DENT, a witness called on behalf of the caveatees, testified that he is a member of the Bar of the District of Columbia, and was formerly the Register of Wills; that about 1901 or 1902, he saw testator on two or three occasions in the office of the Register of Wills, when he came there in connection with the settlement of his sister, Sally Woodbury's estate, of which he was Executor; the conversation was particularly in relation to the affairs of this estate, but occasionally it took a personal turn; witness formed the im-
91 pression that testator's mind was entirely clear, although his physical health was feeble, and that he was of sound mind and capable of executing a valid deed or contract; caveatees here offered in evidence, the will of Sally Woodbury, and the deposition of Henry E. Woodbury in regard thereto, which are in the words and figures following, to-wit:

"I, Sally Woodbury, of the City of Washington, District of Columbia, being of sound and disposing mind, do make and declare this, as and for my last will and testament, hereby revoking all wills by me heretofore made.

First. I give, devise, and bequeath to my only brother Henry E. Woodbury, of Washington City, D. C., all of my property of whatever kind, real, personal, and mixed, absolutely and forever, subject only to such requests, and bequests, as I may hereafter make, on a paper attached to, or enclosed with this my last will, having entire confidence that he will carry out my wishes as therein declared.

Second. I desire and direct my brother aforesaid, to pay to my

nephew, Molyneaux Turner, the sum of one hundred dollars, ($100.00), out of my estate.

Third. I request my brother to pay all legal debts that I may have incurred and all necessary final expenses.

Fourth. I hereby appoint my brother, H. E. Woodbury, of the City of Washington, D. C., executor of this my last will and testament, and request that no bond be required of him.

In witness whereof, I have hereunto set my hand and seal, this ninth day of November, in the year of our Lord one Thousand eight hundred and ninety six.

SALLY WOODBURY. [SEAL.]

The word August wherever it appears being first erased and November interlined.

Signed and sealed in presence of

JOSEPH C. NASH,
HENRY HAYWOOD GLASSIE.
MINNIE HAYWOOD GLASSIE.

92 Signed, sealed, published and declared, by the above named testator Sallie Woodbury as and for her last will and testament, in the presence of us, who at her request, and in her presence, and in the presence of each other have hereunto subscribed our names as witnesses this ninth day of November in the year of our Lord one thousand eight hundred and ninety six.

JOSEPH C. NASH,
No. 1008 *New Hampshire Ave. N. W.*
HENRY HAYWOOD GLASSIE,
No. 1008 *N. H. Ave. N. W.*
MINNIE HAYWOOD GLASSIE,
No. 1008 *N. H. Ave. N. W.*"

"Hearing Before the Register.

WEDNESDAY, *March 11th*, 1903—3 o'clock, p. m.

Met, pursuant to agreement, to take testimony on the part of the Lecutor in the above entitled cause.

Present, the Register, William A. McKenney, representing the Lecutor, Dr. Henry E. Woodbury, and Dr. Molyneaux Turner.

Whereupon HENRY E. WOODBURY, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. MCKENNEY:

Q. Doctor, will you state your name, age, residence and occupation? A. Henry E. Woodbury, physician; residence, 2325 L street. I am a retired physician.

Q. Of lawful age? A. Of lawful age, sound in mind and
93 memory.

Q. What relation, if any, were you to Sally Woodbury, lately deceased? A. Sister. My sister.

Q. When did she die? A. On the 13th of December last.

Q. 1902? A. 1902.

Q. Did she leave a will? A. She did.

Q. I hand you a paper writing and ask you to state what it is, Doctor? (Handing witness paper.) A. (After examining same.) That is the last will and testament of my sister, Sally Woodbury.

Q. When was it executed? A. It was executed in 1896, on the 9th day of November, 1896.

Q. Who drew that instrument? A. She drew it herself. It is her own handwriting, all of it.

Q. Will you look at the first clause of the will? A. Yes.

Q. You will observe that it makes the bequest and devise to you subject to such bequests and devises as she may hereafter make "on the paper attached to or inclosed with this, my last will and
94 testament." A. Yes.

Q. Who found that will after her death? A. I found it. I supposed it was in the safe deposit drawer, but I found it was not, but I didn't know where it was, for I hadn't seen it since 1896. She showed it to me then. I accidently came across it. My house-keeper was sitting in the library with me, and I was going over some old letters in her writing-table drawer, and going over these old letters with the object of destroying them, as they were of no account—letters from lady friends of hers, and I came across, in the bottom of one of the pigeon-holes, this will. I didn't know it was there, and I said immediately to my housekeeper, "There is my sister's will; I didn't know where it was, and I will read it to you." I then—the envelope was unsealed—I took it—and old envelope—and I took it out and read it. When I got through Miss Stevens said to me. "Doctor your sister refers to another paper. Is there another paper there-" She says. "I don't see any," and I said "No," and took up the empty envelope. I said, "There is no such paper," and I will explain that to you. During her last illness—I know this because——

Q. One moment. Did you make a search for any other paper at that time? A. I had made no search, because I knew there was no paper there, but I had gone over the papers, and found there was no other paper.

95 Q. Have you searched since? A. Yes, since.

Q. Go ahead. A. Then I said to Miss Stevens, my housekeeper, "I know there is no paper there, for when she was sick I said to her one day, "Sallie, you wanted to remember the Children's Hospital and other charities, and some of your personal friends. Have you made that paper that you referred to in your will?" She said, "I am not going to Harry. I am not going to," she said, "because I don't want to deprive you of the use of the money." It was about $1,250, she wanted to give away. She said "I will fix it in this way. You write down what I tell you and make a codicil to your will, and

I want you to have the use of that money until my death, and then it is time enough to pay it over to these other appointed parties." That was her motive. There were ten items in the codicil, three I suggested and seven she suggested, and I have added that codicil, had it copied nicely and added it to my will, and it is in your office. It was in accordance with her wishes, and I stated why I made the codicil, because it was to carry out her wishes.

Q. Then, as a matter of fact, Doctor, no such paper as indicated in this will exists? A. No paper exists of that kind, and my knowledge of that is such—I am satisfied it does not, because she was frank with me, and told me she didn't intend to make any such paper,
96 for the reason that we were a unit. Whatever I had, if she survived me, would be hers, and whatever she had would be mine, because I am the last of the family, but she was younger than myself, and I suppose, of course, that is the reason—that stock over there (pointing) I bought and paid for myself.

Q. You state positively that since the signing of the will, that you have made a complete and thorough search, and you find no such paper? A. I have. I find no paper.

Q. And you are satisfied that no paper exists? A. I am satisfied that there is no paper there, to the best of my knowledge and belief. I have destroyed, I suppose a bushel of old letters——

Q. Well, don't bother about that. I hand you two certificates of stock in the Washington Gas-Light Company, one for fifty shares and one for twenty-five shares, both in the name of Sally Woodbury. Will you tell me when the transfer certificate on the back of this stock was signed? A. It was made at the time in pencil here, the 24th day of September, and the reason that I made it in pencil was, at the time that she signed it, the very moment, I didn't fill it in; I filled it in an hour or two after, and I put it in pencil because I didn't have a pen handy, and those dates are the dates when it was
97 done, and our servant, Bessie Gentry, witnessed the transfer.

Q. That was a *bona fide* transfer from her? A. Yes sir, *bona fide*, voluntary on her part. She was sick at the time. She says, "I think that I ought to convey that stock back to you. You gave it to me," she says, "and I think it would save trouble." Then she made the transfer, and I was so taken up with watching her and nursing her that I neglected to have it put on the books; that is the only trouble, but my devotion to her was stronger than any gas stock, and that was the reason that it was not put on. It was an oversight.

Q. The stock was originally purchased and paid for by you. A. By me. She never bought a dollar's worth of gas stock.

Q. Doctor, you have spoken about the desires of your sister, in respect to what you should do under the will. You carried those out, did you not, in accordance with this rough sketch? A. Yes. That was written in her room, sitting on the bed, when she was sick in bed, and she suggested seven of those items, that I should put them in.

Mr. McKenney: Now, I offer this in evidence.

(Note.—And the same is filed by the Register, marked Exhibit.)

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98 Q. You don't object to having it go on record, what you have done? A. I don't see any objection to it. I don't know what objection there could be. I carried out her wishes.

The REGISTER: Not that, Doctor. Here is what I thought you had probably forgotten here.

The WITNESS: It is in the codicil attached to my will.

The REGISTER: I know that, but if this goes in the record it discloses where the residuum of your estate goes. It states here all the balance of my estate, and so forth. I don't suppose you want the contents of your will to be known to that extent.

The WITNESS: I would rather not have it known, of course.

By Mr. MCKENNEY:

Q. Then, in accordance with the desires of your sister, and in accordance with the memoranda which I hold in my hand here, you made bequests to the several charitable institutions named in it? A. Yes.

Q. And to various other persons? A. The two other persons were friends of mine and I hadn't named them in my own will and I put them in. Then I put in the American Security and Trust Company as executor, because I——

Q. Yes. Very well. Then the bequests aggregated $1,210?

99 A. Yes.

JAMES LEWIS, a witness called on behalf of the caveatees, testified that he is a tinner and stove worker, and knew Dr. Woodbury since the latter part of 1900, that from then up to the time of his death, witness saw him whenever he had orders to do any work for him in the line of work on his house, stove work, or roof work, or sheet iron; witness would give him an estimate and then do the work, and bring him the bill, he averaged about two jobs a month in the course of a year; witness would tell testator the condition of the work, whether it needed repair work or new work; testator was hard of hearing, but if he could hear, he was ready with an answer; he always wanted an estimate on the work; witness noticed nothing peculiar about him, other than his hardness of hearing; on cross-examination, witness stated that he did tin and stove work, roofing, sheet iron work, and guttering, and that he kept up this average of two jobs a month on the four different houses of the testator, for four years, and that witness always put in an estimate and always got the job until he got an agent to take charge of some of the work.

HARRY ADAMS, a witness produced on behalf of the caveatees, testified that he was a painter, and knew Dr. Woodbury since the

100 middle of 1902; saw him about a half a dozen times, always about work, would look at the work, tell the Doctor what was needed, and sometimes would get the job and sometimes not; had no difficulty, and noticed no peculiarity, except that if the bill wasn't sent in before two or three days the testator would get after him.

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ANSON S. TAYLOR, a witness produced on behalf of the caveatees, testified that he is an attorney at law, and has known Dr. Woodbury since about 1900; about 1902, he represented him in a landlord and tenant proceeding, that the testator did not attend the trial, but his agent, Shields, who knew of the default, did; witness saw him very frequently, and quite frequently up to perhaps three or four or six months before his death; that witness prepared codicil No. 3, for testator from memoranda of the testator directing certain changes; witness prepared a rough draft of it first, went to his house and read it over to him, then there was probably a change made, and the present codicil No. 3 was then prepared, and witness signed it as an attesting witness; witness also made social calls on the testator; during the latter part of witness' acquaintance with him; testator was very weak physically, but mentally he was bright as a dollar, and clear in everything he wanted to express; witness noticed no mental impairment, and considered him capable of executing a valid deed or contract, would not have witnessed the codicil if he had
101 thought otherwise; that subsequently he was employed to write another codicil, which he prepared, but before he wrote it he received a postal from Miss Stevens that he wished some one else to write it up: that every time witness would go to see him, he would commence talking, and talk loudly, and witness would tell him to let him do the talking, because he could see that he was short of breath, and that it was an exertion, and that witness knew he was a physician.

WILLIAM A. MCKENNEY, a witness produced on behalf of the caveatees, testified that he is a member of the Bar, and the attorney and trust officer of the American Security and Trust Company; that testator first brought a paper to witness and after examination by him, and possibly made suggestions, the testator took it away, and the result was the will which the testator brought here in his own handwriting; and that he last saw the testator some months prior to his death; at his house, where he instructed witness what he wished done in case of his death; between these two occasions witness saw him possibly twenty times, talked with him about the codicils to his will, and generally about his affairs; testator's mental condition during this period was excellent, and witness noticed no impairment, considered him of sound mind, and capable of executing a valid deed or contract; on cross-examination, witness testified that he
102 suggested certain changes in the will, but they were not made because testator preferred to have his own way; that the only one he could recall is in regard to the Probate Judge, which witness told him was a matter for his executor and not for the Probate Judge, but he thought it best unchanged in this respect; caveatees then offered in evidence certain checks in the hand writing of the testator, drawn on the American Security and Trust Company, and paid by said Company, said checks being for various amounts, and extending over a period from December 21, 1902, to January 5, 1905, there being altogether 78 checks. The witness, McKenney,

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further testified that the testator later took the codicils with him, and that he knew the Company would prepare them without charge.

JOHN L. EDWARDS, a witness called on behalf of the caveatees, testified that he is a real estate broker, and first met Dr. Woodbury in June, 1903, and from then until his death, on January 15, 1905, saw him on the average of three or four times a month, first saw him about renting a house, and talked over the matter of commission, etc., testator then put the property in witness' charge and witness still has charge of it, also has charge of the Columbia Street house;
103 during that period saw him principally about repairs, would get estimates, and talk them over with him, discussed a good many things, his family history, his being a member of St. Paul's church, and being a member of several societies, witness thinks that is all and the topics of the day; mentally, testator was very bright; witness did not notice any indication of impairment of intellect, and considered him of sound mind and capable of executing a valid deed or contract; on cross-examination, witness further testified that after testator was taken sick, he used to go up to see him socially sometimes; witness thinks he was a member of the Society of Cincinnati, and he also spoke of the Sons of the American Revolution; witness and testator were members of the same church; witness cannot recall any topics of the day that they discussed, and that the conversations about his family history were that he said some of his ancestors were of revolutionary fame and that he was a member of the Society of the Cincinnati, also said his sister was very devoted to him and he to her.

CHARLES J. BELL, a witness called on behalf of the caveatees, testified that he is President of the American Security and Trust Co., and is also a member of the firm of Bell & Co., bankers, and represents this firm on the stock exchange here; he knew the tes-
104 tator very well; testator was a depositor at the Trust Company; testator's check of March 10, 1903, for $1280, was given in payment for the purchase of ten shares of Capital Traction; he gave witness the order to purchase this; testator's check of April 11, 1903, for $813.10 was for the purchase of Washington Gas Company stock, the order being given to the witness; the check of May 30, 1903, for $870., was for a similar order of Washington Gas Company stock, also the check of June 4, 1903, for $173.50; the check of October 19, 1903, for $562.50, was given for the purchase of some securities, witness cannot recall just what; each of these orders were given witness by Dr. Woodbury himself, who understood thoroughly what he was doing; testator came to witness' office quite often during the year 1903, and spoke to him a number of times on different subjects; witness never saw any evidence that he was not mentally sound in every way; testator told witness that he had left a legacy to the Home for the Incurables, and afterwards informed him that having written to the lady in charge, the President of hospital, for certain information, and they having ignored his letters, he had decided to strike out that legacy, and give it to another charity, and he was very

much hurt that the ladies had not paid attention to the letters, or letter—the witness did not remember whether there was one or more.

Whereupon, counsel for the caveatees announced their testimony closed.

105 Whereupon caveators, in rebuttal, recalled the witness, Walter Whitcraft, who testified that while they were stopping at his house in the summer of 1903, the witness, Mena M. Stevens, spoke of the testator's nephew, Dr. Turner, in a hostile manner, in the presence and hearing of the witness, (until the testator stopped her,) and that the said witness Whitcraft was not acquainted with Dr. Turner at that time. The witness, Bessie Gentry, testified that some three or four months before she left the house of the testator, the witness, Stevens, told her that testator's nephew should not come to the house after his uncle's death, that he would not be mentioned in his uncle's will, and that she hated him.

106 It was thereupon stipulated as a fact in the case that the testator and his wife had never been divorced.

The caveator Molyneaux L. Turner being recalled, testified that the only gift of an office or start in practice given him by the testator was in the summer of 1901 at the 12th Street house, as stated in his testimony in chief; that the testator had never found him living in New York in a haphazard way without visible means of support, at tramp boarding houses; that he had only seen witness in New York on two occasions, namely in August 1895 and in November or December 1895; that witness had at that time bought out a physician's office and practice at No. 1673 Lexington Avenue, in a four story house in which witness had a back room for his office and a sleeping chamber upstairs; that testator bought him no clothing at that time or at any other, except that in 1893, when witness was ill in the hospital with which he was connected, testator made him a present of a suit of clothes, as testified in chief; that in 1895 testator had not brought witness to Washington, but had induced him to sell out his business and come to Washington with his Uncle Edward, who was ill, as testified in chief, and that the testator had never found him at any other boarding house than this house on Lexington Avenue, although he and witness' aunt had recommended him to one at which they stopped when in New York, and at which he had boarded for a short time; that he knows of no neglect of testator of which he was guilty; that he visited him up to the time that he received the letter of April, 1904, requesting him not to call

107 again, as testified to in chief; that he had never made any demands for money from testator, that the latter never gave him money, except 75 cents per week for pocket money, as testified to in chief. That when witness left New York to come to Washington with his Uncle Edward, he did not sell out his practice, but gave it up.

Thereupon Dr. JAMES L. TURNER, father of Molyneaux L. Turner, testified that he had visited the latter when he was located at the Lexington Avenue house, in New York City; that the house and its surroundings were excellent, of first class character, though, of course, not ultra fashionable, and that there was nothing whatsoever in the nature of a tramp boarding house or cheap lodging place about it.

Thereupon caveators, by leave of court, offered in evidence a deed from Henry E. Woodbury to Mena M. Stevens, bearing date the 12th day of September, A. D. 1904, in the words and figures following:

"This Deed, made this Twelfth day of September in the year one thousand nine hundred and four, by and between Henry E. Woodbury, (widower) of the City of Washington, District of Columbia, party of the first part, and Mena M. Stevens, also of said City and District, party of the second part:

Witnesseth, That the party of the first part, for and in consideration of Ten ($10.00) dollars, lawful money of the United States of America, to him in hand paid by the party of the second part, receipt of which, before the sealing and delivery of these presents, is hereby acknowledged, has given, granted, bargained and sold, aliened, enfeoffed, released, conveyed and confirmed, and does
108 by these presents give, grant, bargain and sell, alien, enfeoff, release, convey and confirm unto the party of the second part, her heirs and assigns forever, the following described land and premises, situate lying and being in the City of Washington and District of Columbia and distinguished as Lot No. 151, Square No. 364, otherwise known as No. 1531 Columbia Street, said lot No. 151 being in D. L. Morrison *et al.* subdivision of certain lots in Square 365, as said subdivision is recorded in the Office of the Surveyor for the said District in subdivision book marked H. D. C. folio 6 together with all and singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of the party of the first part, or, in to or out of the said land and premises.

To have and to hold the said land, premises and appurtenances, unto and to the only use of the party of the second part, her heirs and assigns forever.

And the said party of the first part and his heirs, executors and administrators, do hereby covenant and agree to and with the party of the second part, her heirs and assigns, that he will warrant and forever defend the said lands and premises and appurtenances unto the party of the second part, her heirs and assigns, from and against the claims of all persons claiming or to claim the same, or any part thereof, or interest therein, by, from, under or through him, them or any of them.

And further, that the party of the first part and his heirs shall and will, at any and all times hereafter, upon the request and at
109 the cost of the party of the second part, her heirs and assigns, make and execute all such other Deed or Deeds, or other

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assurance in law, for the more certain and effectual conveyance of the said land and premises and appurtenances unto the party of the second part, her heirs and assigns, as the party of the second part, or her heirs and assigns, or her or their counsel learned in the law shall advise or require.

In testimony whereof, said party of the first part has hereunto set his hand and affixed his seal on the day and year first hereinbefore written.

HENRY E. WOODBURY. [SEAL.]

Signed, sealed and delivered in the presence of—
HOWARD S. REESIDE.

DISTRICT OF COLUMBIA, *to wit:*

I, Howard S. Reeside, a Notary Public in and for the District of Columbia do hereby certify that Henry E. Woodbury (widower) party to a certain Deed bearing date on the Twelfth day of September 1904, and hereto annexed, personally appeared before me in said District the said Henry E. Woodbury being personally well known to me as the person who executed the said Deed, and acknowledged the same to be his act and deed.

Given under my hand and seal this 30th day of September, 1904.

HOWARD S. REESIDE, [SEAL.]
Notary Public D. C.

The testimony further tended to show that Howard S. Reeside, the Notary before whom the foregoing deed was acknowl-
110 edged, was an officer of the American Security and Trust Company.

Thereupon JACOB BELT, a real estate dealer, testified that the Columbia Street house, conveyed by the testator in the manner above described to Mena M. Stevens, is worth about $4,000.00.

SAMUEL ROBISON, a witness called for the caveators, testified that the memorandum of May 17th, 1904, the signature to which was testified to by the witness Mena M. Stevens as being in the hand writing of the testator, was written by him at testator's dictation, who signed and gave it to witness, and that it had remained in his possession up to within a week before the trial.

Thereupon the caveators read in evidence, from the deposition *de bene esse* of Anna L. Woodbury, widow of the testator, taken during the progress of the trial, which tended to prove that she was the wife of the testator; that he had seen or spoken to her since he left her rather more than 30 years ago; that they had lived together at No. 912 12th Street, N. W., in the City of Washington; that there had never been any difficulty or quarrel between them; that she executed the deed from herself and the testator to the American Security and Trust Company of Nov. 18, 1903, offered in evidence by the caveatees as above set forth, and acknowledged it before the notary Taylor;

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that she executed it because the testator wanted it, and the physicians had told her to humor him in anything he wanted, whereupon the following ensued: "By Mr. Darlington: Q. Tell us how you
111 came to execute this deed. A. Simply because he wanted it and the physicians had told me to humor him in anything he wanted. Mr. Mattingly: I object to what the physicians told her. The court: I do not think that is competent. Mr. Darlington: I think it is. It is a rule of evidence and of law that the way in which people deal with other persons whose mental competency is in doubt, is evidence of how they regarded him; and in this very deposition, as you will see by looking at it, counsel stated that one reason for offering the agreement was to show that she treated him as a man who was competent to contract. It seems to me that she is certainly and unquestionably entitled to explain why she did it. That is the very reason why these hearsay declarations should not be admitted. The Court: It is purely hearsay as far as I can see. Mr. Darlington: But it is offered as explanatory of her conduct. The doctors are all dead, and we therefore have to take her explanation. Here is an agreement which is offered to show, among other things, that his wife dealt with him as a man who was able to make a contract. Can she not say why she did that—not as proof of the fact, but in explanation of her own action, that the doctors told her she must do it, that she must humor him, as explanatory of her own action. The court: The trouble is that it might explain a thing very well, but there might not be any truth in it. Mr. Darlington: But the Court can instruct the jury that it is only to be received as explanatory of her action. We do not offer it as proof of the
112 statement. I think the proper way would be for the court to instruct the jury that these statements are not evidence of the facts, but are in explanation of her own conduct in dealing with him. I submit that I have a right to show why she did, and the inducement. Mr. Mattingly: And I submit that it is a plain case of hearsay. The court: I do not think it is competent to state what the doctors said about it. Mr. Darlington: Not even as explanatory, or as showing the reason for her action, although counsel on the other side say she made the agreement with him as a man competent to make a contract? Mr. Mattingly: I did not say anything of the sort. Mr. Darlington: You did not, but the other counsel did. You will allow me an exception, your Honor? The court: Yes. Skip the hearsay and go on."

To which ruling of the court, the caveators, by their counsel, then and there excepted, and the court allowed their said exception and entered the same upon its minutes.

Thereupon the caveators in rebuttal further offered to read from the deposition *de bene esse* of the said witness Anna L. Woodbury as explanatory of her action in executing the said agreement of July 1st, 1887, that Dr. Stearns at that time, and other physicians prior to that time, had advised her to sign any paper that the testator wished her to sign; that the testator had said to them and to her that if he did not get rid of her and of the property he would die;

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that this was his mania, and that the physicians had said she must not oppose him in anything—that it was a mania; to which testimony of the said witness, and to each part thereof severally, the caveatees, by their counsel, objected and the court sustained
113 their said objection and refused to permit the said parts of the said deposition of said witness, and each of them, to be read to the jury, to which action of the court, the caveators excepted on the ground that, as further testified by the witness, the physicians named by her were all deceased, that the said testimony was offered as explanatory of her conduct in executing the said paper, and that it was competent for her to testify that the physicians had told her to execute the paper and the reasons assigned by them to her therefor, not as proofs of the fact, but as explanatory of her action. "The court." I do not believe it is any of it competent there. It is not in reference to the paper, but to the general subject—what the lawyer told her and so on. She names certain other doctors who gave her advice, and so on. I do not think any of it is competent. Mr. Darlington: Not even as explanatory of her conduct in making the agreement? The court: No."

To which ruling of the court in excluding the said testimony the caveators excepted, and the court allowed the said exception of the caveators to the exclusion of the same, and each part thereof, and noted their said exception upon its minutes.

Thereupon, in taking the said deposition *de bene esse* of the said witness, counsel for the caveators noted of record that in examining her to the limited extent covered by the deposition *de bene esse*, they did not waive their exception to the ruling of the court which prohibited their examination of her as to the mental condition and characteristics of the testator at the time of their separation
114 or with reference to the property suit or the divorce suit, one of which had been offered in evidence and the other excluded by the ruling of the court, as before set forth in this bill of exceptions.

Thereupon the caveators rested, and all the testimony given by them during the progress of the said cause is hereinbefore set forth.

Thereupon, and after the close of the testimony as aforesaid, the caveators, by their counsel, prayed the court to grant the following instruction:

"If the jury believe from the evidence that, sometime in the year 1904, the testator executed and placed in escrow a deed to Mena M. Stevens, which was not to be delivered to her during his life; that, after having so placed the said deed in escrow, he afterwards recalled it into his own possession and mislaid or lost it, and that he subsequently executed the deed to the said Mena M. Stevens which has been offered in evidence and placed it in escrow to take effect or be delivered only after his death, (then such deed or conveyance differed in no essential respect, for the purposes of this case, from a testamentary instrument, and) the said above enumerated facts, if found by the jury to be true, may be considered by them in connection with the manner in which the testator disposed of his estate,

and, also, as bearing upon the interest possessed by the said witness Stevens in the questions involved in this suit."

But the caveatees, by their counsel, objected to the granting
115 of the said instruction, and the court sustained the said objection and refused to give the said instruction to the jury; to which action of the court the caveators, by their counsel, excepted, and the court entered the said exception upon its minutes.

And next thereafter, caveatees, by their counsel, prayed the court to grant the following instruction:

"6. That every person of twenty-one years of age is presumed to be of sound mind and competent to make a will, and this presumption extends through his life, no matter to what age he may live. To make a valid will it is not necessary that the testator should be endowed with a high order of intellect, or even an intellect measuring up to the ordinary standards of mankind. Nor is it necessary to the making of a valid will that the party should have a perfect memory, and that his mind should be wholly unimpaired by age, sickness or other infirmities. If the party possesses memory and mind enough to know what property he owns and desires to dispose of, and the person or persons to whom he intends to give it, and the manner in which he wishes it applied by such person, and generally fully understands his purposes and the business he is engaged in, in so disposing of his property, he is, in contemplation of law of sound and disposing mind. And neither age, nor sickness, nor extreme distress, nor debility of body will affect his capacity to make a will if sufficient intelligence is present in the testator."

To the granting of which instruction the caveators, by
116 their counsel, objected on the ground that the said prayer would instruct the jury that, if the testator possessed memory and mind enough to know the property he owned and desired to dispose of, the person or persons to whom he intended to give it, the manner in which he wished it to be applied by such person, and understood his purposes and the business he was engaged in, the will would be valid notwithstanding the testator might be the victim of an insane delusion or delusions, and might be influenced to make his testamentary gifts through such insane delusions, and that the said prayer did not require that the testator should be of sound mind as a condition of its validity, but the court overruled the said objection, and granted the said instruction, to which action of the court the caveators, by their counsel, excepted, and the court entered their said exception upon its minutes.

Next the caveatees, by their counsel, prayed the court to grant the following instruction:

"13. To justify a verdict against the will on the ground of the testator's treatment of and declarations as to his nephew, Molyneaux L. Turner, the jury must be satisfied from the evidence that he had an insane delusion in respect of his nephew. Prejudice, mistake of fact, or being misled by false testimony to believe a fact exists which does not exist, is not an insane delusion."

To the granting of which instruction the caveators, by their coun-

sel, objected on the ground that the testimony in the case
117 tended to prove insane delusions, such as that the testator had found the caveator Molyneaux L. Turner in a tramp boarding house, in a destitute condition, had furnished him with clothing, had started him in business, &c., that the testimony was as to what the testator, himself, had done, and that there was no evidence to justify an instruction to the jury based upon the theory of testator's being misled by false testimony to believe facts to exist which did not exist, or to have been influenced thereby, instead of *my* insane delusions, but the court overruled the said objection, and granted the said instruction, and gave the same to the jury, to which action of the court caveators, by their counsel, excepted, and the court entered the said exception upon its minutes.

And thereupon the court, without objection, instructed the jury, on behalf of the caveators, as follows:

"The jury are instructed that, in considering whether at the time that the papers purporting to be the will and the several codicils executed by Henry E. Woodbury which have been offered in evidence were executed, he was of sound and disposing mind, they ought to consider all the evidence that has been submitted to them in this case as to his acts, habits, conversations and declarations, so far as the same may, in the opinion of the jury, throw light upon his mental condition at the said several times; and if, upon such consideration of the evidence, the jury find that at the time the said instruments, or any of them, purporting to have been executed by the said Henry E. Woodbury, were so executed, he did not
118 have sufficient mental capacity to know the extent and value of his property, and the deserts of the person or persons who were the natural objects of his bounty with reference to their conduct towards him and their treatment of him, and their claims and necessities, they are instructed that their verdict should be "No" under the first issue in this case."

"If the jury believe from the evidence that at the date of the paper writing purporting to be his last will and testament, offered in evidence, the sole heir and next of kin of the testator Henry E. Woodbury were his sister Sallie Woodbury, and his nephew Molyneaux L. Turner, and that, at the date of the several instruments offered in evidence and purporting to be codicils to the said last will, his said nephew was his sole heir at law and next of kin, and that, at the date of the execution of the said will and of each of the said codicils, the said testator labored under insane delusions with respect to his said nephew's deserts with reference to his conduct towards and his treatment of the said testator, that the said insane delusions were such as were inconsistent and incompatible, under the facts and circumstances shown by the evidence in this case, with the posses-ion of a sound and disposing mind in that regard by the testator at the time of the execution of the said several instruments, and each of them, and that the said insane delusions were connected with and influenced the execution of the said instruments, and each of them, then their answer to the first issue in this case should be "No."

119 "The jury are instructed that the evidence admitted in this case as to declarations made by the said Henry E. Wood-

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bury are not to be taken as evidence of the truth of the statements alleged to have been made by him, but they are to be taken, if believed to have been made by the testator, as throwing light upon his mental condition, and as representing his beliefs, his feelings, purposes and designs.

"While the caveator was allowed by the court to be cross-examined as to the statements contained in an undated letter purporting to have been written by his Aunt Sallie Woodbury, addressed to William F. Turner, the jury are instructed that neither the said letter nor the use thereof so allowed by the court to be made upon the cross examination of the caveator is to be taken as evidence of the truth of any of the said statements in said letter contained or allowed to be used for the purpose of cross-examination as aforesaid.

"The jury are instructed that, while it is their duty to consider all the testimony in the case, including the testimony of witnesses as to their opinions concerning the mental capacity of the testator to make a valid deed or contract or to execute the will or codicils in controversy in this suit, the question whether the testator in fact was of sound and disposing mind, or in fact possessed such testamentary capacity, is one for the jury alone; and it is their duty to give such weight and credit and such weight and credit only to the said opinion evidence of the witnesses as in their judgment properly attaches thereto under all the facts and circumstances of the case, as shown by the evidence, including the testimony of the said witnesses as to the grounds for their said opinions upon the said subject.

120 "The manner in which the testator disposed of his estate by the will and codicils offered in evidence may be considered by the jury in connection with the other evidence in the case, in considering the issue as to his mental capacity.

"The jury are instructed that, in determining whether or not the alleged will and codicils, or any of them were procured by undue influence, they are to consider all the facts and circumstances in proof reflecting upon that question; and if, upon consideration of all such facts and circumstances, under the instructions of the court in that behalf, the jury are satisfied that the said instruments or any of them, were procured by undue influence, as undue influence is defined by the court in its instructions, then their answer to the second issue in this case as to any such instrument which they shall find to have been so procured should be "Yes."

"And the jury are further instructed in this connection that weakness or feebleness of mind and memory upon the part of said testator, if they find from the evidence that such weakness or feebleness existed, should be considered by them in connection with the other evidence in the case for the purpose of determining the issues of undue influence.

"The jury are instructed that the instructions given them by the court are for their guidance as to the application of the principles of law to the evidence submitted to them, but it is the exclusive province of the jury to judge of the credibility of the witnesses and the weight of their testimony as tending to prove the facts relied on by either party to the suit."

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121 And the court further instructed the jury, without objection, on behalf of the caveatees as follows:

"There is no evidence in this case that the execution of said will and codicils, propounded for probate, was procured by fraud; and the jury cannot set aside the same on that ground.

"That the presumption of law is in favor of the sanity of the testator and of his capacity to make a will; and the burden of proof is upon the caveator to establish by a fair preponderance of the testimony a want of testimentary capacity in order to justify the jury in setting aside the will on that ground.

"The jury are instructed as matter of law that they are not authorized to pass upon the question of the reasonableness of the provisions of the alleged will, and codicils thereto, of the said Henry E. Woodbury; nor would they be justified in finding against its validity because they thought the provisions of said will unreasonable or not in accord with their ideas of what is right, or of what the disposition of the property should have been. The jury can only consider the provisions of said will *as one of the circumstances* to be weighed by them, in connection with all the other circumstances disclosed by the evidence, in determining the testamentary capacity of the said Henry E. Woodbury.

"The jury are instructed as a matter of law that to invalidate a will on the ground of undue influence, it must appear, by a preponderance of the evidence, that such undue influence was practiced with respect to the will or as to some matter or circumstance
122 so connected with it, as to raise a presumption that such undue influence affected the provisions of the will; any degree of influence exercised over the testator which does not affect the making of the will, or any of its provisions, cannot invalidate it.

"Undue influence which will avoid a will means unlawful influence. All influence which may be used to induce a person to make a will in a given way is not unlawful. It is not unlawful for any person to suggest to the testator to make a will in a particular way, in favor of the person or persons so suggested, or any other, and to present arguments and reasons giving support to such suggestion. Such suggestion and argument addressed to the judgment and reason of the testator for the purpose of influencing him as to the propriety thereof are not unlawful, and therefore not undue, although they may have the effect of influencing him to make a will different from what he otherwise would have made, so long as the will is the direct act of his own deliberate judgment. Influence to be undue, and therefore unlawful, is that degree of importunity which overcomes and destroys the judgment and will of the testator, and induces him to make a will he did not desire to make, in order to rid himself of such importunities.

"The will should not be set aside on the ground of undue influence except upon satisfactory proof that such influence was exerted; and proof of opportunity to exert it, or of suspicion that it was exerted, is not sufficient.

123 "That in determining the question of undue influence the jury have the right and it is their duty to take into considera-

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tion the provisions of the will itself, in connection with all the other evidence in the case bearing upon the question whether the testator was coerced by threats or otherwise, into making the will in question; or whether he, of his own will and volition, made and executed the said will so that it expresses his own wishes and intentions."

And thereupon the court, of its own motion, charged the jury as follows:

"Gentlemen of the jury, this case presents two issues or two questions, which you are to determine and answer by your verdict.

First, that of testamentary capacity.

Second, that of undue influence.

Under the statute in this District, the owner of any real or personal estate which might pass by deed or gift; or in case of his death intestate, which would descend to or devolve upon his heirs or personal representatives, is subject to be disposed of by his last will, testament or codicil.

The statute also defines who are capable of making wills, and says, that the testator, if a male, must be 21 years old, and if a female, 18 years; and must be at the time of executing or acknowledging the will, of sound and disposing mind, and capable of executing a valid deed or contract.

What does this mean? Who is capable of executing a valid deed or contract. Who has a sound and disposing mind?

124 By long years of experience and litigation, the courts have reached a substantially uniform conclusion on this subject.

The law looks, in this matter, only to the competency of the understanding of a testator. Neither age nor sickness, nor extreme debility of body, will affect the capacity to make a will, if sufficient intelligence remains.

It is not necessary for him to have a perfect memory, or high order of intellect, or a strong mentality, or a mind measuring up to the ordinary standards of mankind.

If he has memory and mind enough to know what property he owns, in a general way; and the person or persons who are or should be the objects of his bounty, and to whom he wishes his property to go; and generally, fully understands what he is doing in making a disposition of his property, he is, in contemplation of law, of sound and disposing mind.

If you find from all the evidence in the case that said Henry E. Woodbury had such mental capacity at the time when he signed the will and codicils, then you should answer the first issue, or interrogatory, in the affirmative, by the word yes; but if you find that he did not have such mental capacity at such times, then you should answer this issue in the negative, by the word no.

As to the second issue of undue influence, I will state briefly what is meant by that as defined by the law.

Undue influence, to avoid will, must be such as to destroy the testator's free agency; such as will overbear, by excessive importunity or imposition, the mind of the testator in the matter of his will, so that the testamentary paper, as signed and witnessed, under such

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influence, does not in fact express the testator's wishes as to
125 the disposition of his estate, but expresses the wishes and purposes of the person or persons exercising such influence.

The exertion of an honest influence, by persuasion, or moderate, or reasonable importunity, will not invalidate a will. It must be such influence as compels the testator to do that which is against his will, either from fear, or desire for peace, or some other feelings which he is unable, under the circumstances of the case to resist.

If you find from all the evidence that such influence was exerted in this case on the mind of the testator, Henry E. Woodbury, as to cause him to make the will and codicils in this case against his own volition, you should answer the second issue in the affirmative, by the word yes. If you are satisfied that the evidence fails to show such undue influence, then you should answer this second issue in the negative, by the word no.

The will of a person found to be possessed of sound mind and memory, is not to be set aside on evidence which only tends to show a possibility, or suspicion of undue influence.

As is stated in one of the prayers, every man is presumed to have a mind that is capable of making a valid will, and if the jury, in considering the case, finds that he has enough mind to make a will, then no evidence that merely raises a suspicion that somebody induced him to make that will contrary to his own wishes should prevail. The will, supported by a presumption in favor of the capacity, and being in the exercise of a right that every citizen has to dispose
of his property in that way, should not be set aside without
126 proof that undue influence was exerted in the matter of the will, or some portion of it that would be affected.

A good many witnesses have testified here as to opinions. I am going to give you an instruction in regard to the testimony that may aid you, perhaps, in reaching a proper con*sul*sion on that subject.

"The value of an opinion of a witness, not an expert, depends upon the facts as observed, and he must first state those facts before he can be allowed to give his opinion. The testimony of the attesting witnesses, however, is based upon a different consideration. They may give their opinion as to the testator's mental condition without first stating the facts upon which they are founded. As stated in the authorities, the subscribing witnesses to a will are chosen by the testator, and are, under the law, charged with an important duty in relation to the execution and proof of the will. It will be presumed that in the performance of that duty they will observe carefully the appearance of the testator at the time, and form an opinion as to his sanity. The witness signs the attestation clause, knowing at the time that the question of the testator's mental capacity will be asked him in court, if he shall be living at the testator's death, and for that reason an honest and intelligent witness will take pains to satisfy himself on that subject before signing his name."

The same remark might be made with reference to the testimony of medical witnesses. Medical witnesses who have made a study of

mental soundness or unsoundness are entitled under the law to give their opinions without giving the reasons for them,
127 setting out in detail what facts they have observed. Their opinions are received in courts for the same reason, that it is in the line of their business as expert witnesses from observations they make concerning a party.

In reaching a conclusion, however, the jury should look to the facts upon which witnesses have expressed their opinions as to the soundness or the unsoundness of the mind of the testator rather than to the opinions themselves, for the reason that the value of an opinion of one who is not an expert in cases of this kind depends upon what he has heard, seen and noticed; but a verdict should be reached by the jury only after a careful consideration of the whole evidence, including all the facts and opinions and, from the nature of the facts stated and the opinions where such have been expressed the jury must form its own opinion as to the capacity of the decedent at the time he made his said will.

In this case it is claimed that the testator was mentally unsound, for the reason that it is said he had delusions with reference to his nephew, and delusions that would prevent him from exercising his right as a sane man to make a will and disinherit his nephew or cut him off with $100.

What is meant by insane delusion I am going to try to define to you in these words:

Insane delusions constitute that species of mental unsoundness which is marked by persistent and incorrigible beliefs that things which exist only in the imagination of the party are real. An insane delusion consists in the belief of facts that no rational person would believe. It is a delusion that it is a pertinacious ad-
128 herence to some delusive idea in opposition to plain evidence brought to the mind of the party of its falsity. In other words, it seems to be an unreasoning and incorrigible belief of the existence of facts which are either impossible absolutely or at least impossible under the circumstances of the individual.

It is evident from the testimony in the case, that Doctor Woodbury had a feeling against his nephew. He expresses it in his will. He has expressed it to witnesses. If that feeling arose whether it was justifiable or not by any acts of the nephew and any disagreement between them, and was a prejudice that grew up out of that fact, and out of that fact only, you could not attribute that feeling to an insane delusion. It would not grow out of a man's mind being unsound, but it grew out of the other matter, the disagreement they had had or the prejudice he entertained about it. He may not have treated him justly, but still if his feeling grew out of something else, if it grew out of the fact that the nephew went to live with Dr. Woodbury's wife, from whom he was separated, or if it grew out of the fact that the nephew would not take his advice in reference to medical matters, and things of that kind, you cannot attribute that to an insane delusion. That would be a difference of opinion which any men might have, and would have a right to have, and he would still have a right to make his will to suit himself. If he had the

capacity to make a will, he had a right to disinherit him if he saw fit, whether the reason was a just one or not. He had dominion over his own property, if he had the capacity to make a will and to dispose of it, and the mere fact that he disliked his nephew would not justify the nephew in having the will broken, if it grew out of something other than insanity, something other than an unsound mind. No matter what it grew out of, if it was something other than the question of unsound mind, that would not affect this case at all in favor of the nephew.

I have tried to make that plain, and I think I have done so; so that you will understand what is meant with reference to the delusions in the instructions I am now about to read that have been formulated by counsel, and which I will give you in just a moment.

In examining this testimony, of course, it is for you to determine what witness you will believe, or what part of his testimony you will believe, and what part you will reject. You are not obliged to believe any witness simply because he comes here on the witness stand and tells something, makes a statement here. If you think there were any circumstances about it or any other fact established in the case that showed he was telling something that was untrue, you have the absolute right to disregard it, or to disregard such parts as you think are erroneous. In this case the testimony so far as it comes with reference to delusions of the testator seems to be largely based upon the statements of the contestant, the caveator here. Of course he is a party who is directly interested in this controversy, and you are to consider that question in determining his testimony. Of course you apply to him the same rule you apply to anyone else. If they are interested in this controversy, then take that into account in weighing his testimony. Consider the manner in which the testimony was given on the witness stand, and look at all the other circumstances in determining the question of the weight of the testimony to be given to any particular witness.

The caveator has the burden of proof. He must, of course, satisfy your minds by a preponderance of the evidence that the testator was of unsound mind at the time this will was executed, and he must satisfy you on the other issue, if you find that issue in his favor, that the will was produced by undue influence.

In arriving at that point as to whether he does establish that burden of proof, that is, whether he satisfies your minds by a preponderance of the evidence, of course, you are to consider his interests as well as the interests of every other witness who may have any inerest in the controversy, in determining the credibility of his testimony.

The other reasons, as has been stated by counsel, why this feeling arose, have not been clearly developed in the case, or perhaps they may not have been developed as they might have been if Dr. Woodbury or his sister had been living to give their side of the controversy. They might have given it a different color, or they might not. I simply call your attention to that fact in order that you may look at that with reasonable minds, and carefully, so as to give the weight to each witness that his testimony will import, and no more than that."

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Whereupon the court read the respective prayers of the caveators and the caveatees which the court had granted, above set forth, to the jury. And the court gave no further instructions to the jury.

131 The foregoing contains the statement of all the facts and evidence necessary to explain the bearing of the rulings upon the issues and questions involved.

All the foregoing proceedings were had and all the exceptions hereinabove mentioned were noted before the jury retired to consider of its verdict.

After noting the said exceptions hereinbefore set forth, and the making of the same, and each of them, a part of the Record, which are also made a part hereof, and because the matters and things hereinbefore recited are not matters of record, and in order that the caveator may have his case reviewed on appeal by the proper court, the caveator, by his attorneys, moves the court to sign and seal this, his bill of exceptions, to have the same force and effect as if each and every of the said exceptions had been separately signed and sealed, which motion is by the court granted; and thereupon the caveator tenders this, his bill of exceptions, and requests the court to sign and seal the same according to the statutes in such cases made and provided, which is accordingly done, now for then, this 7th day of November, A. D. 1906.

JOB BARNARD, *Justice.* [SEAL.]

NOTE.—The caveators objected to the inclusion in this bill of exceptions of the cross-examination of Molyneaux Turner as to his professional and business career, and, severally, to the summary of the testimony of the witnesses, Alfred Harding, Charles J. Shields, John Paul Earnest, Louis A. Dent, James Lewis, Harry

132 Adams, Anson S. Taylor, William A. McKenny, John L. Edwards, and Charles J. Bell, on the ground that the same are unnecessary and without relevance to explain the bearings of the rulings of the trial court upon the issues and questions involved, and are improper to be incorporated into the bill of exceptions under the rules and practice of the Court.

JOB BARNARD, *Justice.*

(Endorsement: Bill of Exceptions. Filed Nov. 7, 1906. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

133 In the Supreme Court of the District of Columbia, Holding a Probate Court.

Probate No. 12809.

In re Estate of HENRY E. WOODBURY, Deceased.

Precipe for Transcript.

The Clerk will please prepare a transcript of record in the above cause consisting of the following:

March 27th. Petition for Probate.
May 19th. Answer and Caveat.
October 6th. Order framing issues.

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1906.

February	26th.	Order of trial of issues by jury.
March	6th.	Verdict sustaining will.
March	30th.	Motion for new trial overruled.
April	12th.	Order admitting will to probate.
April	13th.	Letters Testamentary.
April	16th.	Notice of Appeal.
April	18th.	Citation issued.
April	18th.	Order fixing penalty of bond at $100.
April	25th.	Appeal bond approved.
April	26th.	Received by Judge Barnard for settlement.
Nov.	7th.	Bill of exceptions signed by Justice Barnard.
Nov.	14th.	Order of Severance on appeal.
		Bill of Exceptions.
		This precipe.

J. J. DARLINGTON,
C. F. CARUSI,
Att'ys for Appellant.

Consented to
WM. F. MATTINGLY,
STANTON C. PEELLE,
For Cavcators.

134 Form No. 94.

Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *to wit:*

I, James Tanner, Register of Wills for the District of Columbia, Clerk of the Probate Court, Do Hereby Certify the foregoing pages, numbered from 1 to 133, inclusive to be true copies of the originals of certain papers on file in the office of the Register of Wills, Clerk of the Probate Court, in case No. 12,809 estate of Henry E. Woodbury deceased, wherein Molyneaux L. Turner is appellant, and the American Security & Trust Co., *et al.*, are appellees, the same constituting a full, true, and correct transcript of record of proceedings had in said cause according to the precipe of counsel filed therein and made a part hereof.

I Further Certify, That the bond for appeal, in the penalty of One Hundred dollars, was duly filed by said appellant, and approved by said Court on the 25th day of April, A. D. 1906.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said Probate Court, this 17th day of December, A. D. 1906.

[Seal Supreme Court of the District of Columbia, Probate Jurisdiction.]

JAMES TANNER,
Register of Wills for the District of Columbia,
Clerk of the Probate Court.

Endorsed on cover: District of Columbia supreme court. No. 1747. Molyneaux L. Turner, appellant, *vs.* American Security and Trust Company *et al.* Court of Appeals, District of Columbia. Filed Dec. 18, 1906. Henry W. Hodges, clerk.

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WEDNESDAY, *March 6th, A. D.* 1907.

No. 1747.

MOLYNEAUX L. TURNER, Appellant,
vs.
AMERICAN SECURITY AND TRUST COMPANY, THE CHILDREN'S HOSPITAL, THE GARFIELD MEMORIAL HOSPITAL.

The argument in the above entitled cause was commenced by Mr. C. F. Carusi, attorney for the appellant.

THURSDAY, *March 7th, A. D.* 1907.

No. 1747.

MOLYNEAUX L. TURNER, Appellant,
vs.
AMERICAN SECURITY AND TRUST COMPANY, THE CHILDREN'S HOSPITAL, THE GARFIELD MEMORIAL HOSPITAL.

The argument in the above entitled cause was continued by Messrs. S. C. Peelle and W. F. Mattingly, attorneys for the appellees, and was concluded by Mr. C. F. Carusi, attorney for the appellant.

January Term, 1907. No. 1747.

MOLYNEAUX L. TURNER, Appellant,
vs.
AMERICAN SECURITY AND TRUST COMPANY, THE CHILDREN'S HOSPITAL, THE GARFIELD MEMORIAL HOSPITAL.

Opinion.

Mr. Justice McCOMAS delivered the opinion of the Court:

The Supreme Court of the District, holding a Probate Court, admitted to probate and record as the last will of Henry E. Woodbury, a paper dated April 11, 1902, purporting to be his last will and five codicils thereto, dated, respectively, January 5, October 30, and December 23, 1903, and February 18 and December 20, 1904. These testamentary papers give his estate, worth about $40,000 dollars in real and personal property, to the Garfield Memorial Hospital and to the Children's Hospital, after paying $1,000 in small legacies. From the judgment in the Probate Court below Molyneaux L. Turner appealed.

Doctor Henry E. Woodbury, the testator, died January 15, 1905, aged seventy-nine years. His sister, Sally Woodbury, who lived in his home, had died December 18, 1902. He had married about 1870 but in less than two years thereafter his wife and he had separated. They were never divorced and she survived him. In 1887, they

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had united in a deed whereby each released all interest in the property of the other.

The testator had been a busy physician until in 1881 he fell and seriously injured himself and in consequence of his injuries retired from practice. During the last twenty-five years of his life he was quite feeble and devoted his time to the care of several houses he owned, to his investments and to gratifying his intellectual tastes. He was deaf and suffered from chronic bronchitis. Four physicians and many other witnesses testified that he was of sound mind and quite competent to make his will. He had no children.

Molyneaux L. Turner, the son of a deceased sister, was his heir and next of kin. Turner was born in 1870 and graduated in medicine in 1893, and had employment at the Children's Hospital in New York for a year, and then became a physician with the Netherlands Steamship Company, and in 1895 opened an office as a physician in New York and in the next year abandoned it and came to Washington where he lived with his uncle, the testator, until August, 1896, when he was appointed on the staff of the Emergency Hospital, where upon small pay he remained until September, 1897. In November of that year he became physician to the Panama Canal Company with a salary of $50 a month. He resigned in the summer of 1898 and soon was appointed volunteer surgeon in the Army at $150 a month and resigned his position in June, 1900, only to avoid going to the Philippines. He lived with his father in New York city until February, 1901, when he returned to Washington and lived with the testator, who in June of that year provided him with an office room in a house on Twelfth street. In August, 1901, Dr. Turner went to live in the home of Mrs. Woodbury, the discarded wife of the testator. There he remained looking after her property and especially after the affairs of a mining company in which both were interested. His relations with the testator appear to have been friendly until February, 1904.

After the death of Sally Woodbury, Mena M. Stevens became housekeeper and nurse for the testator. The caveator claims that during the rest of his life she possessed and exercised great influence and control over him, though not as potent as the influence of Sally Woodbury over him during her lifetime. The will was executed during the lifetime of his sister, and all the codicils after her death and while Miss Stevens lived in the house, and there is evidence that she was not kindly toward Dr. Turner.

The will and codicils are in the testator's handwriting. By the will Dr. Woodbury gave his property to his sister for life and to Dr. Turner a hundred dollars, a gold watch and one-fourth interest in a house on Twelfth street, in Washington. The will mentioned that so much would have been the share of his mother had she lived, and added that the testator's reason for not remembering his nephew more generously was that the nephew by ingratitude and indifference had forfeited all claim to the testator's consideration and had embittered the closing years of his life. To his discarded wife, Anna L. Woodbury, he gave $10, and made the Washington Home for Incurables the residuary legatee.

On January 5, 1903, he executed the first codicil in order to fulfill testamentary requests of his sister Sally by making several requests. The next codicil executed October 30, 1903, revoked the clause giving one-fourth interest to the Twelfth street house to Dr. Turner. It appears in evidence that in the meantime he had paid Turner $550 for such interest and the caveator's evidence suggests that the testator drove a shrewd bargain with his nephew. The third codicil, also numbered two, executed December 21, 1903, is largely a repetition of the last mentioned codicil and adds a request to the probate judge for an order to make sure of the destruction of the testator's papers.

It appears that the managers of the Home for Incurables were indifferent to their intended benefactor and because they ignored his letters, the codicil of February 18, 1904, revoked the devise and bequest of the residue of his estate and gave that residue after payment of several small bequests to the Garfield Hospital and the Children's Hospital, each of this District, share and share alike. The last codicil, executed December 20, 1904, was executed only to substitute the American Security and Trust Company the executor in place of Mr. and Mrs. Robeson to assist Miss Stevens in destroying the testator's papers.

The testator told Dr. Sowers, his physician, that he expected his nephew would contest this will. The testimony shows that Turner and his Aunt Sally became estranged sometime before her death, and that Dr. Woodbury, who had been very friendly, but ungenerous, toward his nephew, grew indifferent and finally bitter toward him, and the nephew appears to have attempted to do many things without great success and the uncle was disappointed in him. The purpose to leave the bulk of his estate to charity persists in all the testamentary papers and was unchanged during the last three years of his life. There is nothing to show that Miss Stevens sought to influence the testator to give his property to charity. There is much evidence that the nephew failed to conciliate these relatives. The aunt bequeathed to him a hundred dollars, and this testator gave him the same sum. His uncle and aunt and Miss Stevens each had grown to dislike him. It may have been the nephew was in fault; that he was heedless, ungrateful, inconsiderate. It may have been that his elderly relatives expected more unselfish consideration than their conduct deserved. There is no duty requiring an uncle to give his estate to a nephew, and he may even dislike a nephew without such dislike being an insane delusion.

While the testator disliked Dr. Turner, he liked Miss Stevens, and by deed conveyed to her a house worth $4,000 and transferred to her $2,300 worth of gas stock. She received no salary for two years' care and nursing of an enfeebled old man who was, during the last year, confined to his house—often confined to his bed—although he transacted his own business and at different times purchased stock between the date of the will and his death, attended to his own bank account, and drew many checks upon the trust company, which became his executor, and there is evidence of various business transactions by the testator at times and until shortly before his death.

The appellant states nineteen assignments of error. The first eleven of these relate to the same question, the admissibility of the opinions of lay witnesses respecting the mental capacity of the testator. We need not review the testimony of the seven witnesses for the caveatee who expressed the opinion that the testator was of sound mind, after having shown more or less acquaintance with the testator and more or less incidents and facts remembered from their acquaintance. Of these witnesses, Mrs. Emma M. Johnson had known the testator 20 years. He had been her attending physician. During the last eight years of his life she had seen him every six months and during his last illness she had several times called at his house, and saw him there about three weeks before his death. Mrs. Foster Causey had known him all her life, he had been the family physician and she had been in his home four or five times during the last five years of his life and there at times he repeated at her own request his own verses and other better English verse and would sing to her and talk of his home life in New Hampshire. Mrs. Louisa Thompson met the testator six times during the summer before his death and to her he spoke of her father, who had been an army surgeon with the testator, and with her he talked over the times of the civil war, and also about his home life in earlier days as having been happy and bright, and remarked upon the loneliness of life as he drew near the end of it. John C. Bardroff was a witness to one of the codicils, and beside that had often carried the rent of a house to the testator, and had frequently discussed with him the condition of the testator's property, conversing about each of his houses, and often talked of other matters and made social calls upon him when they would talk about topics of the day, masonry and the accident which had injured the testator years before. Mrs. Margaret Osmun knew the testator fifteen or twenty years, and he often called at her house and she visited him every few weeks at his home after he became ill. He would talk about himself, about his sister and Mrs. Osmun's mother, an invalid friend of his. They would discuss topics of the day and he would speak much about his profession and also about his insurance and his agents, and though he spoke about money affairs and about his houses and repairs to them, she could not recall specific conversations. Reverend E. M. Thompson was rector of the church of which the testator became a member about two years before his death, and the witness visited the testator during the last two summers of his life. Sometimes they discussed his physical condition, sometimes his literary attainments, at other times his private affairs. The testator told of papers he had written and read before medical societies. He recited selections from his favorite poets and sometimes regaled the clergyman with the testator's own verses. Charles J. Shields knew the testator during the last six years of his life and for the last three years had the care of his house on New Jersey avenue. He had talked with the testator about certain stock and about his home and repairs to it and after Shields took the testator's house to rent he saw the testator two or three times a month and during the last six months much more frequently. It was natural for these witnesses to fail to reproduce the minute details of

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conversations and incidents with Dr. Woodbury. Where witnesses in testamentary contests essay to repeat conversations years before, such conversations are imagined, not remembered. Often the meagre statement of a witness well acquainted with a testator is more trustworthy. After the witness has stated such particulars as he can remember, the ordinary lay witness is permitted to sum up the total remembered and unremembered impressions of the senses by stating the opinion they produce. As the Supreme Court has said, to allow less may deprive a party of important and valuable evidence that can be got at in no other way. The trial judge should permit such testimony with caution. In the Federal court such evidence is admitted not only because of its intrinsic value, but from necessity. The jury and court did not know the testator ordinarily; and if a witness knew him during many years, and repeatedly conversed with him, or had business transactions or spent social hours with him, or had visited him in sickness, or in health, and especially if the witnesses have no interest in the result of the litigation, the knowledge which such witnesses possess is knowledge of which court and jury should not be deprived. It is natural that such witnesses can not charge their memories with distinct independent facts so as to present them in their entirety to the jury. When such a lay witness testified to all the facts and circumstances he can recall, and then is permitted by the trial judge to give his opinion of the mental soundness or unsoundness of the testator, such an opinion may safely be permitted to go to the jury for it is the sum of all the circumstances and incidents and is the impression which the deceased testator's acts and words have left upon the mind of the witness. "The jury, being informed as to the witness' opportunities to know all the circumstances, and of the reasons upon which he rests his statement as to the ultimate general fact of sanity or insanity, are able to test the accuracy or soundness of the opinion expressed, and thus, by using the ordinary means for the ascertainment of truth, reach the ends of substantial justice." See Connecticut Mut. Life Ins. Co. *v.* Lathrop, 111 U. S., 612, 621; Queenan *v.* Oklahoma, 190 U. S., 548, 549.

The trial judge has the best opportunity to determine whether a lay witness should be permitted to express an opinion as to the mental capacity of a testator in such a controversy as this, and we can not agree with the appellant that the court below committed error in respect to any of these witnesses nor can we say that in any instance there was such lack of long and intimate acquaintance with the testator or such want of opportunity to form a judgment or such absence of facts from which the opinion of such a nonexpert witness should be based that the court below committed reversible error in any of the ten exceptions we have just considered.

It would be impossible to make a rule declaring just what class of facts would show a sufficient foundation for the opinion of a lay witness concerning the mental capacity of a testator. The determination must depend mainly upon the circumstances developed by the examination of each witness and, therefore, should be left largely to the wise legal discretion of the trial court and its ruling in such cases should not be disturbed unless it clearly appears that it did not

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properly exercise such discretion. See Denning *v.* Butcher, 91 Iowa, 430; O'Connor *v.* Madison, 98 Mich., 188.

For the same reasons we think that the court should have admitted the opinion of the witness Charles Coomb, who had known the testator about twenty-five years and lived nearby, who being a painter had worked in the house for the testator and his sister, and who often saw the testator at intervals not longer than a year apart, who had observed within five years of the testator's death that he would forget one thing and talk about something else. Coombs had gone about the year 1901 to talk with the testator about buying from him his house on Twelfth street and observed that the testator did not seem to understand what he was talking about. We think this witness was qualified to express an opinion, and had the opinion been offered it would have been error to have excluded it. But the appellant stopped short of a specific offer of proof of the opinion of the witness Coomb. By the record it appears the witness had an opinion. He was not permitted to state it. Counsel did not state and we can not assume to know the opinion of a witness. De Forest *v.* United States, 11 App. D. C., 461. It suffices to say that upon the first assignment of error the judgment of the court below should not be reversed.

The twelfth and thirteenth assignments of error relate to the exclusion of the record of the divorce suit between the testator and his discarded wife, and to the admission of an agreement between them of the date of July 1, 1887. During several years after marriage these two lived together and then Dr. Woodbury separated from his wife, Anna L. Woodbury, and instituted a suit for divorce. The caveator offered the record of this suit to show that for thirty odd years before his death Dr. Woodbury was subject to the insane delusion that his wife was incapable of a valid marriage by reason of a physical malformation, an allegation and belief which was contrary to fact, and so shown by the report of physicians, appointed by the court to examine her, filed in that suit, and the caveator also offered to show that notwithstanding this serious charge was groundless, Dr. Woodbury had never visited or spoken to his wife during the last thirty odd years of his life. We can not say that the trial court in the exercise of its sound discretion erred in excluding this evidence which tended to show a delusion affecting Dr. Woodbury more than thirty years before the making of the will and codicils.

Nor do we think the court committed error in admitting the agreement between the testator and his wife executed July 1, 1887, whereby each released all interest in the property of the other. The caveator had been permitted to show the unbroken estrangement of Dr. Woodbury from his wife during thirty odd years and this agreement relating to the separate estate of each of the parties does not appear so important as counsel would make it. It was a mere detail consequent upon the long and unbroken separation. We can not say the court committed reversible error in admitting it.

The fourteenth and fifteenth assignments of error are that the court erred in excluding the testimony of Mrs. Anna L. Woodbury explaining her action in executing the agreement just mentioned

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upon the ground that she had been advised by physicians and others that her husband was the victim of a mania and that she must not oppose him in anything and that she yielded because he wished this paper executed and that she had executed in November, 1903, along with the testator a deed to the American Security and Trust Company for like reasons. The two papers executed by Mrs. Woodbury were in evidence. It is assigned as error that she was not permitted to state the reason why she executed these papers and the reason was her belief that the cograntor was mentally incapable of making a deed. The court below did not prejudice the appellant in excluding such a bad reason and since this belief of her husband's mental incapacity rested upon the statements of physicians and others as to her husband's mental condition, the court committed no error in excluding all this hearsay, opinion evidence. Upon no ground could Mrs. Woodbury's testimony here proffered be admissible.

The sixteenth assignment of error presents a more serious objection. Upon cross-examination, the caveator, Turner, was asked whether he had not addressed profane epithets to his Aunt Sally Woodbury. He denied having done so, and when asked, admitted with some qualification that she was a truthful woman. Caveatee's counsel thereupon showed him a letter addressed by her to his uncle, William H. Turner. He identified this letter as being in her handwriting. In spite of objection, the court permitted the caveator to be cross-examined in respect to the statements in the letter and also admitted parts of the letter to be read to the jury wherein he was charged with ingratitude, insult, and injury, and the writer said she feared personal harm from him, and that he had used the profane and insulting language about which the caveatee's counsel had asked him. The court committed grave error in admitting this cross-examination and this evidence, but the court endeavored to correct the error by instructing the jury that "neither the said letter nor the use thereof so allowed by the court to be made upon the cross-examination of the caveator is to be taken as evidence of the truth of any of the said statements in said letter contained or allowed to be used for the purpose of cross-examination as aforesaid."

The general rule is that if evidence which may have been taken in the course of a trial be withdrawn from the consideration of the jury by the direction of a presiding judge, that such correction cures any error which may have been committed by its introduction. Pennsylvania Co. *v.* Roy, 102 U. S., 451, 452; Hopt *v.* Utah, 120 U. S., 430, 438; Throckmorton *v.* Holt, 180 U. S., 555, 567. Here the court sought to remove the effect of its error and clearly pointed out the specific evidence which the court at the later stage of the trial withdrew from the consideration of the jury. After careful consideration we are convinced that this judgment should not be reversed upon this ground and that the court sufficiently corrected its error within the general rule we have just stated.

The seventeenth assignment of error is to the refusal of the court to grant an instruction that the deed from the testator to Miss Stevens was in the nature of a testamentary instrument which might be considered in connection with the manner in which he had dis-

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posed of his estate and also in considering the interest of the witness Stevens in the question involved in this suit. In so far as the caveator was entitled to it, he had the benefit of the evidence to which this instruction related and the court had the right to refuse the segregation of some facts for this special instruction. Inasmuch as the deed to Miss Stevens and the transfer of the gas stock had been admitted in evidence, the jury necessarily considered the testator's disposition of this part of his estate and inevitably recalled the interest of Miss Stevens as a witness in the pending controversy.

The eighteenth and nineteenth assignments of error are without merit. The court's own instruction so fully and correctly informed the jury concerning the law relating to insane delusion that the phraseology of the prayer objected — in the eighteenth assignment of error could not have injured the caveator, and for similar reasons the instruction which is the basis of the nineteenth and the last assignment of error when considered in connection with the court's own instruction in no wise prejudiced the case of the caveator before the jury.

We would not be justified, because of the minor and inconsiderable errors to which we have adverted, in reversing the judgment, when the record discloses a fair trial and a just and impartial charge by the trial judge, accompanied by a frank and sufficient correction of the only material error we have observed.

The judgment of the court below must be affirmed, with costs, and it is so ordered.

TUESDAY, *May 7th*, A. D. 1907.

No. 1747, April Term, 1907.

MOLYNEAUX L. TURNER, Appellant,

vs.

AMERICAN SECURITY AND TRUST COMPANY, THE CHILDREN'S HOSPITAL, THE GARFIELD MEMORIAL HOSPITAL.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE McCOMAS.

May 7, 1907.

THURSDAY, *May 16th*, A. D. 1907.

No. 1747.

MOLYNEAUX L. TURNER, Appellant,
vs.
AMERICAN SECURITY AND TRUST COMPANY, THE CHILDREN'S HOSPITAL, THE GARFIELD MEMORIAL HOSPITAL.

On motion of Mr. C. F. Carusi, of counsel for the appellant, It is ordered by the Court that an appeal and writ of error to remove this cause to the Supreme Court of the United States be, and the same are hereby, allowed, and the bond for costs on said appeal and writ of error is hereby fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Molyneaux L. Turner, Appellant, and American Security and Trust Company, The Children's Hospital, The Garfield Memorial Hospital, Appellees, a manifest error hath happened, to the great damage of the said Appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of May, in the year of our Lord one thousand nine hundred and seven.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———,

———————,

(*Bond on Appeal.*)

Know all Men by these Presents, That we, Molyneaux L. Turner as principal, and The Aetna Indemnity Company, as surety, are held and firmly bound unto American Security and Trust Company, The Children's Hospital, The Garfield Memorial Hospital in the full and just sum of Three hundred ($300.00) dollars, to be paid to the said American Security and Trust Company, The Children's Hospital, the Garfield Memorial Hospital, their certain attorneys, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22nd day of May, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Molyneaux L. Turner and The American Security and Trust Co. et al, a decree was rendered against the said Molyneaux L. Turner and the said Molyneaux L. Turner having prayed and obtained an appeal and Writ of Error to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said American Security and Trust Company, The Children's Hospital, The Garfield Memorial Hospital citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Molyneaux L. Turner shall prosecute said appeal and writ of error to effect, and answer all costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

MOLYNEAUX L. TURNER. [SEAL.]
THE AETNA INDEMNITY CO., [SEAL.]
By WILLOUGHBY S. CHESLEY, [SEAL.]
Resident Vice-Pres't.
Attest: M. E. MERSHEIMER. [SEAL.]
Resident Ass't Sec'y.

[Seal of The Aetna Indemnity Co.]

Sealed and delivered in presence of—
WM. F. HOLTZMAN, JR.
R. PARKS.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 1747. Molyneaux L. Turner, Appellant, *vs.* American Security and Trust Co. *et al.* Bond for Costs on Appeal and Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 23, 1907. Henry W. Hodges, Clerk.

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UNITED STATES OF AMERICA, *ss:*

To American Security and Trust Company, the Children's Hospital, The Garfield Memorial Hospital, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Molyneaux L. Turner is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 24th day of May, in the year of our Lord one thousand nine hundred and Seven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 24th day of May, A. D. 1907.

WM. F. MATTINGLY,
Att'y for Am. Sec. & Trust Co., and Children's Hospital.
STANTON C. PEELLE,
5 25 07 *Att'y for Garfield Hospital.*

[Endorsed:] Court of Appeals, District of Columbia. Filed May 25, 1907. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To American Security and Trust Company, The Children's Hospital, The Garfield Memorial Hospital, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Molyneaux L. Turner is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard Chief Justice of the Court of Appeals of the District of Columbia, this 24th day of May, in the year of our Lord one thousand nine hundred and seven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 24th day of May, A. D. 1907.

WM. F. MATTINGLY,
Att'y for Am. Sec. & Trust Co. & Children's Hospital.
STANTON C. PEELLE,
5/25/07 *Att'y for Garfield Hospital.*

[Endorsed:] Court of Appeals, District of Columbia. Filed May 25, 1907. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 76 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Molyneaux L. Turner, Appellant, *vs.* American Security and Trust Company, The Children's Hospital, The Garfield Memorial Hospital No. 1747, April Term, 1907, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 25th day of May A. D. 1907.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,750. District of Columbia court of appeals. Term No. 101. Molyneaux L. Turner, appellant and plaintiff in error, *vs.* American Security & Trust Company, The Children's Hospital, and The Garfield Memorial Hospital. Filed June 3d, 1907. File No. 20,750.

Office Supreme Court, U. S.
FILED.
JAN 16 1909
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

MOLYNEAUX L. TURNER,
Appellant and Plaintiff in Error,
vs.
AMERICAN SECURITY AND TRUST COMPANY, THE CHILDREN'S HOSPITAL, AND THE GARFIELD MEMORIAL HOSPITAL.
} No. 101.

APPEAL FROM AND IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

J. J. DARLINGTON,
CHARLES F. CARUSI,
Attorneys for Plaintiff in Error.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

MOLYNEAUX L. TURNER,
Plaintiff in Error,
vs.
AMERICAN SECURITY & TRUST COMPANY, *et al.*
No. 101.

BRIEF SUBMITTED ON BEHALF OF PLAINTIFF IN ERROR.

This is a writ of error from the judgment of the Court of Appeals of the District of Columbia affirming the judgment of the Supreme Court of the District of Columbia admitting the paper writing purporting to be the last will and testament of Henry E. Woodbury to probate and record as a will of real and personal property.

In the statement of facts which follows, the summary of the testimony will be limited to what is necessary for the proper consideration of the errors assigned, and it may not here be improper to call the attention of this court to the fact that the Record, although it consists in large part of the testimony of witnesses in no way bearing upon or throwing light upon any of the

points of law presented by the exceptions, is not sufficiently *complete* to enable an appellate court to intelligently consider any question as to the weight of the testimony. Only so much of the testimony taken on behalf of the appellant is to be found in the record as under paragraph 4, rule V of the rules of the court below, was necessary to throw light upon the several exceptions taken. The appellant's compliance with that rule of the Court of Appeals has proven unfortunate for him. The appellee on the other hand has, as is apparent from even the most casual reading of the opinion filed by the late Justice McComas of the court below, profited by the introduction into the record (over the express objection of the appellant, a young man of slender means, Record, p. 65) of all the testimony taken in behalf of the appellees, the examination in chief of the numerous witnesses being given in full, and the cross-examination omitted. These preliminary observations concerning the record have been deemed necessary to meet the suggestion of the appellees as stated in their brief filed below and which will undoubtedly be repeated here, as follows:

> "It is manifest from the record in this case that the evidence introduced on the part of the caveators would not have justified the jury in setting aside the will, either on the ground of undue influence or of unsoundness of mind. But, taken in connection with the evidence introduced on the part of the caveatees, it is evident that no verdict other than the one rendered, in favor of the will, could have been permitted to stand."

It is perfectly well settled by the decisions of this court that such a suggestion as that contained in the foregoing excerpt cannot, or at least should not, be heeded by a Federal appellate court.

Marine Ins. Co. vs. Young, 5 Cranch, 187, 191.
Barr vs. Gratz, 4 Wheat., 213;
River Bridge Company vs. R. R. Company, 92 U. S., 315;

R. R. Co. vs. Fraloff, 100 U. S., 24, 31-32;
Borgher vs. Life Ins. Co., 103 U. S., 90;
Wabash R. R. Co. vs. McDaniels, 107 U. S., 454, 456.

Will contests, or the trial of issues in respect to wills before a jury, furnish no exception to the rule; the weight of the evidence in these, as in all jury trials, is a question for the jury, and for the jury alone, into which it would be unconstitutional for any Federal appellate court to attempt to inquire.

Olmstead vs. Webb, 5 D. C. App., 38, 48;
Barbour vs. Moore, 10 D. C. App., 30, 49-51.

The well remembered and much quoted case of Beyer vs. LeFevre, 186 U. S., 114, wherein this court overruled the Court of Appeals, and the Supreme Court of the District of Columbia, was cited as apparently establishing a different rule upon this subject. If the real question upon appeal was sought to be narrowed down to the propriety of the action of the trial justice (the same who tried the LeFevre case) in submitting this case to the jury, the proper way to raise that question would have been by a cross appeal wherein such an assignment of error could have been rightly passed upon with a full record before the appellate court.

This appeal is based upon specific exceptions to the rejection of testimony offered on behalf of the appellant, to admission of testimony offered on behalf of the caveatees, to the rejection of instructions offered by the caveators, and to the granting of instructions on behalf of the caveatees.

STATEMENT OF FACTS.

By his will and the codicils thereto, dated respectively April 11, 1902, January 5, 1903, October 30, 1903, December 30, 1903, February 18, 1904, and December 20, 1904,

the testator gives practically his entire estate, consisting of about $20,000 in realty and a like sum in personalty, to the Garfield Memorial and to the Children's Hospital, disinheriting his only heir at law and next of kin, the appellant, and leaving ten dollars to his widow, who joined in the caveat but died pending the appeal.

The testator died January 15, 1905, at the age of seventy-nine years, surviving a sister, Sally Woodbury, who died December 18, 1902, to whose influence during his life he was strongly subject, according to the testimony offered on behalf of the caveator. At her death, Miss Mena M. Stevens took charge of him and his home, in the capacity of nurse and housekeeper, and, as claimed by the caveator, exercised influence and control over him until the time of his death, receiving from him considerable gifts of personal property, and a deed of valuable real estate, held in escrow during his life and which was not to take effect until after his death.

There was also testimony to the effect that Miss Stevens sought to estrange the testator from his old friends, whose testimony as to his condition might prove inconvenient, while on the other hand the visits of some others became correspondingly frequent.

The appellant Molyneaux L. Turner was the testator's nephew (being the child of a deceased sister), who graduated in medicine in 1893, the testator, also, being a physician. The testimony on behalf of the appellant, at p. 12 *et seq.*, is to the following effect: "Shortly after his graduation, he visited, for a month, the testator and his Aunt Sally in Washington, upon their invitation; returning to New York, he was appointed physician in charge of the Insane Division of the Childrens' Hospital, after which he was appointed surgeon on board the Netherlands Steamship Line, following which he opened an office for the practice of medicine in the City of New York, in the summer of

1895. In the latter part of that year, the health of Dr. Edward Woodbury, another uncle, and also a physician, becoming seriously impaired, the appellant, at the request of the testator, gave up his office and came to Washington with Dr. Edward Woodbury, remaining with and caring for him until his death at the home of the testator, after which he lived with the testator and Miss Sally Woodbury, at their request and according to a form of life prescribed by them, which required that he should not be out of the house later than 9 o'clock in the evening, that he should have seventy-five cents per week spending money, keeping an account of it in a book provided for the purpose, which he should submit to testator for examination to see how it was expended, the appellant being then 27 years of age, and having been a practicing physician for four years. In August, 1896, against the wishes of his aunt and uncle, he obtained an appointment in the Emergency Hospital for the customary term of eight months, which the Hospital enlarged for an additional four months, contrary to the custom of that institution, on learning of which extension both the testator and Miss Salliy Woodbury wrote the letters set out at p. 13 of the Record asking annulment of the extension, their object in so doing being to have him return and live with them, collect rents, cut the grass and perform like services, accompanied by no proposition in regard to the practice of his profession. During the war with Spain, he secured an appointment as Assistant Surgeon in the United States Army, at a salary of $1,800.00 per annum, which appointment the testator, also, endeavored to have canceled. In 1900, the appellant resigned this position, in order to avoid service in the Philippine Islands, and again took up his residence with his Aunt Sally and the testator, at their request. The only effort made by them to enable him to engage in the practice of his profession was in June, 1901, at which time they provided

an office room in a vacant house on 12th street, requiring his office hours to be from 12 to 1 and from 4 to 6 o'clock, with no one to answer the bell at other hours, and with inadequate equipment, the occupation assigned him outside of his office hours being to perform odd services as above set forth. Later, Miss Sally Woodbury objecting to the maintenance of his office, on the ground that it prevented the renting of the 12th Street house, and the testator's wife, with whom he had not lived for many years, under circumstances presently to be stated, having offered the appellant a room at her house, he accepted it and went there, this, however, making no difference in his relations with the testator and aunt, whom he continued to visit, dining and lunching with them occasionally at their invitation, and being cordially received by them, and the testator presenting him with a number of medical books while so living at the house of Anna L. Woodbury. His relations with the testator continued pleasant up to about the month of February, 1904, when the testator returned a box of cigars which appellant had sent him on the preceding Christmas Day, and requested appellant not to call upon him again. At this time Mrs. Stevens was the housekeeper, who, though declaring the appellant had never done her any injury, admitted that she did not feel "very friendly toward him," and was shown by other witnesses to have spoken of him in a hostile manner, in the presence and hearing of strangers, until requested by the testator to desist, and to have declared that appellant should not come to the house after the testator's death, that he would not be mentioned in his will, and that she hated him (Record, pp. 36, 52).

The 12th Street house, above referred to, had belonged to the appellant's grandmother, and had been by her devised to the testator in trust to retain one-half the rent for his own use, to divide the remaining rent between Edward Woodbury, Sally Woodbury and the appellant's mother, and,

upon any sale, to divide the proceeds equally, one-fourth to each of the said parties, appellant's mother having died many years before the testator, leaving appellant her only heir. In 1903, the testator asked appellant to sell him the latter's share in the property, saying that he wished this done to make his mind easy, and to keep him from worrying, whereupon appellant told him he would do whatever testator desired; that testator then proposed to give him $550.00 for his one-fourth share, stating the house to be worth $6,000.00, but that he, the testator, had been paying taxes and making repairs on it for thirty years, and appellant accordingly, though knowing that the testator had collected the rents of the house, yielding six per cent on a valuation of $8,000.00, and that he would not be entitled to retain the rents during the thirty years, and charge against appellant's share the taxes and repairs, yet, to relieve the testator's mind from worry and to gratify him, made the conveyance as requested. This is the property referred to in paragraph two of the will (Record, p. 23), and in codicil No. 2, at page 26 of the Record, the one devising to appellant the one-fourth interest which was already his, and the other revoking the demise on the ground that testator had purchased the interest.

The testimony further showed that, in the year 1881, the testator had received personal injuries through a fall occasioned by defect in the streets, for which he brought an action against the District of Columbia; that he was a witness for himself at the trial, testifying to his perfect physical and mental health theretofore, and his success as a medical practitioner and author, but that, since the injury, he had developed "an old man's memory," could remember the past but not recent occurrences, could not remember what he read, or the names or character of diseases with which he had been perfectly familiar, that his mental impairment had been so great as to require his abandonment

of the practice of medicine, that he was suffering from degeneration of the spinal cord, affecting the brain, and that the disease had invaded his mental powers, and made him a mental wreck (Record, p. 9).

Other witnesses testify that after the accident his mental condition had not allowed him, ever, to resume the practice of medicine, and that he admitted his incapacity to write prescriptions; that he would begin to talk on one subject, but would get off on something else, wholly unconnected; that his strength of will was poor, being practically wholly controlled by Miss Sally Woodbury during her life, and by the nurse, Mena Stevens, afterwards; that on several occasions he sought to make slight presents to friends in the absence of the nurse, and stated he wished to do so while she was out, because he would "catch it if she knew about it" (Record, pp. 9-10); that, in the summer of 1903, he would talk interestingly and coherently for a time, then break off, stop abruptly, start to tell something about his past life, then break off, not continuing the thread of conversation at all; that he was easily excited, treated by Miss Stevens exactly as a nurse would treat a patient, or a woman a helpless child (Record, p. 11), and that the only subject upon which he could sustain a continuous conversation was poetry (Record, p. 15), etc.

With regard to his separation from and relations to his wife, the caveators offered in evidence the record of an equity suit brought by him against her in 1872, alleging physical malformation rendering her incapable of a valid marriage, and that, upon an examination of her made by the order of the court, the charge was ascertained to be utterly unfounded—this evidence being, however, rejected by the trial court as being too remote, subject to an exception presently to be noted. On many occasions he stated that he had been divorced from his wife (Record, p. 10), contrary to the fact (p. 52). At other times he declared

that he did not wish to sell the 12th Street house because he had so many fond recollections connected with it, he and his wife, who was dead, having lived there so happily (Record, p. 10); in the deed to Mrs. Stevens (Record, p. 53), he described himself as "widower," although his wife in fact survived him.

With regard to appellant's treatment by the testator and his aunt, and the conditions which they exacted of him, the facts above stated are uncontradicted by any testimony. The witness, J. Alfred Bates (Record, pp. 10-11), testified that testator informed him he had made the appellant the allowance of seventy-five cents per week, giving him a book in which to keep an account of how he spent it, complained that the young women of the neighborhood made fun of the arrangement, and during the last years of his life developed an abnormal animosity against his nephew, leading the witness to believe that he was a monomaniac upon that subject, and upon the subject of discipline. He told the witness Gawler (Record, p. 12) about a year before his death, that his nephew was a damned rascal, that he did not wish the undertaker to let him come to the funeral, and that "he had already received more than he was entitled to," "what was coming to him and more besides"—all that he had received from the testator being $550.00 for a one-fourth interest in a piece of property worth $8,000.00, and including the appellant's share of the rents for thirty years.

On cross-examination of the appellant, it was further shown that the testator had claimed that the appellant's aunt had come to his relief when he had no money, no decent underclothing and not a decent suit; that, at a house at which he boarded when in New York, the proprietor required him to enter the basement, because he looked like a tramp, and the proprietor did not want the other boarders to see him (Record, pp. 18-19), all of which statements were

shown to be without foundation (Record, pp. 18-19-52-53), and were not attempted to be proved or in any manner controverted, the testator, moreover, being proved, also without dispute, to have been conscientious and truthful.

As evidencing mental capacity, the will and codicils were shown to be in the handwriting of the testator; the testimony further showing, however, that he would bring a paper down to the attorney for the executor—the American Security and Trust Company, about which the latter would make suggestions, the testator would take it away, bring it back again, "and the result was the will which the testator brought here in his own handwriting," his interviews with the attorney being on possibly twenty different occasions, at which they talked about the codicils, etc. (Record, p. 50).

The provision of codicil No. 2 (Record, p. 27), requesting "the Hon. the Judge of Probate to make an order as to the destruction of certain papers, documents and clippings after my death," the attorney advised him to omit, informing him that this was a matter for the executor, and not one for the probate judge, but this suggestion the testator did not accept, bringing back the codicil with this clause retained (Record, p. 50).

On the cross-examination of the appellant, a paper writing was offered in evidence, dated October 18, 1893, signed by him, undertaking to "keep away from hospital employees, especially nurses," that he would not ask to return to New York unless for serious illness of his father, etc., which instrument was prepared by the testator and signed by the appellant under the circumstances and for the reasons testified to by him at page 19 of the Record.

The foregoing summary of testimony with such additional facts as it will be necessary to mention in connection with the several exceptions is believed to be sufficient for all purposes of this appeal.

ASSIGNMENT OF ERRORS.

The court erred as follows:

I. In holding that a sufficient foundation had not been laid by the testimony to permit the witness Charles Coomb to state his opinion as to the mental capacity of the testator, and in refusing to permit the said witness to give his said opinion.

II. In holding that a sufficient foundation was laid for the giving in evidence of an opinion by the witness Mrs. Emma M. Johnson as to the mental capacity of the testator, and in permitting her to state such opinion.

III. In overruling the motion of the caveator to strike out the answers given by the witness Mrs. Emma M. Johnson as to the mental capacity of the testator.

IV. In holding that a sufficient foundation was laid for the giving in evidence of an opinion by the witness, Mrs. Foster Causey, as to the mental capacity of the testator, and in permitting her to state such opinion.

V. In holding that a sufficient foundation was laid for the giving in evidence of an opinion by the witness, Mrs. Louisa Thompson, as to the mental capacity of the testator, and in permitting her to state such opinion.

VI. In holding that a sufficient foundation was laid for the giving in evidence of an opinion by the witness, John C. Bardroff, as to the mental capacity of the testator, and in permitting him to state such opinion.

VII. In holding that a sufficient foundation was laid for the giving in evidence of an opinion by the witness, Mrs. Margaret Osman, as to the mental capacity of the testator, and in permitting her to state such opinion.

VIII. In overruling the motion of the caveator to strike out the answers given by the witness, Margaret Osman, as to the mental capacity of the testator.

IX. In permitting the witness, E. M. Thompson, to describe the testator's mental condition.

X. In refusing to grant the motion on behalf of the appellants to strike out the testimony of E. M. Johnson, undertaking to describe the testator's mental condition.

XI. In holding that a sufficient foundation was laid for the giving in evidence of an opinion by the witness, Charles E. Shields, as to the mental capacity of the testator, and in permitting him to state such opinion.

XII. In excluding the record of the divorce suit between the testator and Mrs. Anna L. Woodbury.

XIII. In admitting in evidence the agreement between the testator and Mrs. Anna L. Woodbury of July 1, 1887.

XIV. In excluding the testimony of Mrs. Anna L. Woodbury in regard to the agreement between her and the testator, of July 1, 1887.

XV. In excluding the testimony of Mrs. Anna L. Woodbury in explanation of her uniting with the testator in executing the deed of November 18, 1903.

XVI. In permitting the caveatees to read to the jury an alleged letter from Miss Sally Woodbury purporting to be addressed to William H. Turner.

XVII. In refusing appellant's instruction, at pp. 56-7 of the Record.

XVIII. In granting appellee's instruction No. 6.

XIX. In granting appellee's instruction No. 13.

I.

The exclusion of the testimony of the witness Charles Coomb of his opinion as to the mental capacity of the testator is shown at page 8 of the Record. The witness testified that he had known testator for about twenty-five years, living about a square from him, during which period he had seen him about once a year; that from time to time

he worked at his business as a house painter for testator and his sister, Miss Sally, mostly for the latter; that, on these occasions, the testator would talk about the work and not seem to know what he wanted done or understand it, and his sister would tell him to go away, that she would attend to it; that he noticed this condition four or five years before his death; that he was forgetful, would start to talk about one thing and then talk about something else entirely different; that, in 1901 or 1902, witness went to see him about buying the 12th Street house, talking mostly to the sister, who would tell the testator to stop and she would do the talking but testator would talk now and then about it, though he seemed not to understand it, and as if he did not know what was meant, and that, on these occasions, witness formed an opinion as to whether the testator was mentally capable of transacting business. Thereupon counsel for the caveatees objected to the witness being allowed to state his opinion, on the ground that a sufficient foundation had not been laid, which objection the court sustained, and refused to permit the witness to state his opinion as to the testator's mental capacity to transact business, to which ruling the caveator duly excepted.

Under the above ruling of the court, the caveator was able to introduce the opinion evidence of only two lay witnesses, Mrs. Arnold and Mr. Whitcraft, upon this, the most important point in the case, being unable to use any of his witnesses whose dealings with the testator were not of a more intimate character than those of the witness Coomb.

The Court of Appeals in its opinion (Record, 72) concedes that the court should have admitted the testimony of the witness Charles Coumbe, that the latter was qualified to express an opinion, and that "had the opinion been offered, it would have been error to have excluded it"; but that, counsel for plaintiff in error not having stated what was the witness' opinion, the court could not assume to know

it, and, therefore, that the judgment of the court below should not be reversed for its action in that regard. The authority stated for this conclusion is De Forrest vs. United States, 11 App. D. C., 461.

With the utmost respect for the court below, we submit that the case cited fails utterly to support the conclusion announced, and that the conclusion, under the facts and circumstances of this case, is untenable, either upon principle or upon the authorities.

In De Forrest vs. U. S., the excluded question was whether a witness for the prosecution had stated to the witness under examination a reason why the former had testified in the case as she had done; *held*, that there was no error, because it did not appear "how the proposed testimony was in any way relevant," it being impossible to conjecture from the record what was its purpose, unless it were to impeach the credibility of the preceding witness, and for this purpose no foundation had been laid in the examination of the witness sought to be impeached. In other words, the court found it unnecessary and improper to reverse a judgment because of the exclusion of testimony, for which no possible relevancy was disclosed by the record.

Is the like objection possible with respect to the excluded testimony under consideration? The witness had formed an opinion whether the testator was mentally capable of transacting business, upon a basis which the Court of Appeals concedes was entirely sufficient for the purpose; and the court further concedes that that opinion was admissible, and should not have been excluded. It was relevant, and most material, upon the most important question the jury were called upon to decide. It was that opinion, specifically, that the excluded question called for. The appellant was entitled to it, whether or not his counsel, without being asked by the court to do so, stated whether they expected it to be favorable to him, or whethey they knew if the

opinion of the witness would be favorable or not. That they expected it to be favorable was sufficiently evidenced by their insistence upon the question; and that they were justified in that expectancy is apparent from the facts testified to by the witness as the grounds upon which his opinion had been formed.

The only ground upon which the opinion of the court below can be explained is, that it acted upon the view, enunciated in some of its decisions, that an error must appear affirmatively to have been prejudicial to the plaintiff in error in order to justify the reversal of the judgment against him. See Hardy vs. U. S., 3 D. C. App., 44-5, which was a criminal case, involving life. But if so, the ruling is in direct conflict with repeated decisions by this Court.

Thus, in Gilman vs. Higley, 110 U. S., 47-50:

> "It was said by the Supreme Court of Montana, on appeal, that since the record did not contain all the testimony, the court could not see that defendants were injured by the refusal to have the questions answered. We have not before heard of such a rule of a revisory court. The furthest any court has gone has been to hold that, when such a court can see affirmatively that the error worked no injury to the party appealing, it will be disregarded."

This court in Deery vs. Cray, 5 Wall., 807, uses this language:

> "Wherever the application of this rule is sought, it must appear so clearly as to be beyond doubt that the error did not, and could not, have prejudiced the party's rights."

See, also, Smith vs. Shoemaker, 17 Wall., 630-9; Moores vs. Bank, 104 U. S., 625-30; Vicksburg R. R. Co. vs. O'Brien, 109 U. S., 99-103; Mexia vs. Oliver, 148 U. S.,

664, 673; Ward vs. Cochran, 150 U. S., 597, 610; R. R. Co. vs. O'Riley, 158 U. S., 334-7; Peck vs. Heurich, 167 U. S., 624-9.

Although, in the later case of Ferry vs. Henderson, 36 Wash. Law Rep., 745-6, the Court of Appeals endeavors to distinguish the present case from the one then before it, it is quite plain that it has failed to do so upon any principle. In Ferry vs. Henderson, it reversed the judgment below for the exclusion of questions the purpose of which was not stated, and the relevancy of which was nothing like so plain as in the present case, basing its action upon the following ground:

> "When incompetency and irrelevancy are clear and apparently insurmountable, it may not be necessary always to state the objection specifically. *Nor, where the competency or relevancy are alike plain from all the circumstances, is it necessary to assign specific grounds for admissibility.*"

In the case at bar, the Court of Appeals held the testimony competent, while its relevancy is incapable of dispute. The only distinction suggested was that, "under the circumstances of that case, i. e., the case at bar, it was held that it was the duty of the party to show what was that opinion, so that the appellate court might be able to determine whether the exclusion was in fact prejudicial." The only "circumstances of the case" competent to be considered by the court in passing upon the question were, that it was a contest over the will, in which the mental capacity of the testator was the principal issue, that the witness had enjoyed opportunities for forming an opinion as to that capacity, and that he had in fact formed such an opinion, upon grounds disclosed by his testimony, which grounds the Court of Appeals, itself, held to be sufficient. Upon the

authorities heretofore considered, circumstances favoring the validity of the will, or to the prejudice of the caveator, contained in the evidence adduced on the part of the caveatees, were incompetent for consideration in any particular in the decision of the question; and, apart from this, there were no circumstances other than those above enumerated.

That, in this later decision before noted, the Court of Appeals has laid down the correct rule, namely: that, "where the competency or relevancy are alike plain, from all the circumstances, it is not necessary to assign specific grounds for admissibility," is clear in principle and is amply sustained by the authorities.

> "The true rule, we think, is that, when it is apparent on the face of the question asked the witness what the evidence sought to be introduced is, and that it is material, it is sufficient. But when it is not apparent, then the party seeking to introduce the evidence is required to state what he expects to prove, and thus make its materiality appear."
>
> Mitchell vs. Harcourt, 62 Iowa, 349, 351.

In County Commissioners vs. Gantt, 78 Md., 286:

> "If the question was in itself proper and pertinent, it was quite unnecessary for the defendants to state the purpose for which it was offered. The record does not, it is true, show what would have been the answer to the question, and this the record can not show for the reason that the witness was not allowed to answer the question."

And, upon rehearing asked and granted, the court, reaffirming its judgment, said, at page 292:

> "It is sufficient to say that the question, in itself, suggests the object and purpose for which it was asked, namely, to contradict Gantt, who testified that he

turned over to witness uncollected taxes to the amount of $12,000.00. The question being pertinent and material, and the object of it being plain and obvious, the witness ought to have been allowed to answer it. If the witness had been allowed to answer it, how far and to what extent his answer may have influenced the jury in its verdict, no one can say."

In Williams vs. Fuller, 68 Neb., 354, 361, the court said:

"The rule requiring a formal offer to prove in order to obtain a review in an appellate court of a ruling by which evidence is excluded, is of doubtful value at best; it is a matter of grave doubt whether its application does not more frequently defeat than promote justice, and retard rather than expedite its administration. The reason generally assigned for it is that such offer challenges the attention of the trial court to the nature and character of the evidence sought to be introduced, and enables it to rule on the objection interposed advisedly. We are not disposed to extend this rule beyond the reason underlying it. In this case, the questions propounded clearly indicate what the defendants expected to establish by the answers thereto. Under such circumstances, it would have savored of an insult to the intelligence of the court to make an offer showing what the defendants expected to prove by the witness. To enforce the rule under such circumstances would be absurd."

See also, Bauernschmidt vs. Maryland Trust Co., 89 Md., 507, 510:

"The rule referred to is a rule of substance and not of form. There must be reasonable ground to believe that the excepting party has been hurt by the exclusion of a question, but there need not be a formal tender of proof. In this case, the series of questions put and excluded show the defendant's purpose and expectation

so clearly that it would be unjust not to deal with the offer of evidence on its merits."

Daly vs. Building Assn., 172 Mass., 533.

"From the entire record, there can be no doubt that these questions were not ruled inadmissible because of the failure to state the answers expected, or that they were material."

Robinson vs. Ry. Co., 189 Mass., 594, 597.

See, also, Foree vs. Smith, 1 Dana, 151; Marshall vs. Marshall, *et al.*, 17 Kans., 313, 316.

"I think the question, itself, pointed with sufficient certainty to the supposed nature and competency of the expected reply. The form of the question, and the circumstances under which it was propounded, sufficiently show that plaintiff proposed to prove something said as a part of the *res gestae*, and the court should have heard or seen the answer, and then have passed upon its competency."

Gunn vs. Ohio River Ry. Co., 36 W. Va., 165, 179.

These authorities, we submit, and the principles upon which they proceed, recognized by the Court of Appeals itself in its later decision in Ferry vs. Henderson, are conclusive in their demonstration that the Court of Appeals erred in refusing to reverse the judgment below upon this, the first assignment of error.

II—XI.

The next ten exceptions, which may be considered together, relate to the rulings of the court upon the same subjects, in favor of the caveatees, and which, it is submitted, are not only inconsistent with the ruling covered by the preceding exception, but carry the admissibility of opinion evidence far beyond the limitations recognized or permitted by any of the authorities.

Mrs. Emma M. Johnson, a witness called by the caveatees (Record, p. 20) had seen the testator perhaps once every six months during the last six or eight years of his life, the last time about three weeks before his death, at his house, "where they would usually speak of his profession, poetry, or something else that was beautiful and interesting;" and, upon no other foundation than this, over the objection of the caveator, she was permitted to testify that "his mental condition did not seem to be impaired at all"; that there was not any impairment, and that the witness thought he was capable of attending to business. On cross-examination, the witness testifying that she was not sure that he ever attended to any business after his accident in 1881, that she could not recall anything he said to her, or that she ever heard him speak of any kind of business during the last five or six years of his life, the caveator moved to strike out the above answers, given upon her direct testimony, upon the ground that it now further appeared that the witness was unable to give any grounds which rendered her competent to state her opinion, which motion was overruled by the court, and exception taken.

Mrs. Causey, daughter of Mrs. Johnson, called as a witness on behalf of the caveatees (Record, p. 21), had seen the testator about three or four times during the last five years of his life, during which time she testified he had been the physician of her family, that he had been a man of wonderful memory, especially for his home life in New Hampshire; that he would repeat his own poetry at witness' request, had a sweet voice and would sing, upon which foundation only, over the objection of the caveator, the witness was permitted to express her opinion that in the latter three or four years of his life he was mentally capable of attending to business, and that he gave no indication during those years of any mental unsoundness. Upon cross-examination, the witness testified that she thought he had never

acted as the physician of her family since his accident, and that, if the accident occurred twenty-five years before, which was and is an undisputed fact in the case, she was too young to have formed any opinion as to his mental capacity at that time; that she had no personal knowledge of any business transactions by him of any kind; that her first call upon him at his residence was about nine months before his death; that neither she nor Mrs. Johnson, her mother, had visited the house until Mrs. Stevens, who was their personal friend, had gone there, and that all the testator had said to her about his New Hampshire life was, on one occasion she spoke of having a friend named Woodbury, when he said there was a place called Woodbury in New Hampshire, and that he had been there.

Mrs. Louisa Thompson, a witness called on behalf of the caveatees, testified that she met the testator the summer before his death, seeing him probably six times; that he spoke of his memories of the Civil War, and of witness' father, who had been an army surgeon with him during that time, and that he sometimes spoke of his home life as having been very bright and happy, but that he was left alone and was nearing his end; upon which basis, over the objection of the caveator, she was permitted to express her opinion that he was very clear in mind, and that she noticed no impairment of his intellect at all.

John C. Bardroff, a witness called on behalf of the caveatees (Record, p. 30), was the employee of a real estate firm which had charge of one piece of property belonging to the testator, had carried the latter the rent, and conversed with him as to the condition of his house, and on other topics, also, making social calls, talking of the topics of the day, Masonry, and the accident to the testator, but stating nothing said or done by either the testator or witness at these conversations; whereupon, over the objection and exception of the caveator, on the ground that no sufficient basis had

been laid, the witness was permitted to give his opinion that the testator's mental condition, so far as he knew and observed, was good, and that he was a very bright man. On cross-examination, the witness testified he could not recall any report made by him to the testator about the property, or anything he had told him about it, or anything the testator had said to witness upon the subject, or upon any of the topics of the day testator had discussed with him, either in substance or otherwise; whereupon the caveators moved to strike out the testimony as to his opinion, upon the ground that it further appeared no sufficient basis existed, which motion the court overruled, exception being duly noted.

Mrs. Osmun, another witness called on behalf of the caveatees (Record, pp. 30-31), testified she had known the testator fifteen or twenty years; that they frequently interchanged visits; that they talked about the topics of the day, about his profession, his insurance, his agents, and various topics, but not stating anything said or done by the testator, whereupon, over the like objection and exception, the witness was permitted to give her opinion that the testator's mind was clear, and that she thought him competent to attend to business "or in anything of that kind." Upon cross-examination, the witness testifying that she could not recall or state any conversation she had had with the testator, or any of the topics of the day she discussed with him, or anything he had ever said to her, the caveator moved to strike out her above recited opinion as to his mental capacity on the ground that it further and more fully appeared that no proper basis had been given or existed, which motion the court overruled, exception being duly taken.

Rev. E. M. Thompson, a witness called on behalf of the caveatees (Record, p. 40), testified that the testator was a member of his church for about two years before his death,

that witness visited him during the summer months of 1904; that they had conversations upon subjects of a varied character, his physical condition, his mental attainments and accomplishments, and sometimes about his own private affairs; that, when witness first knew him, he was going around and seemed active, but in the last year of his life was in bed most of the time, whereupon, without more, the witness was allowed to testify, over the objection that no conversation or data upon which to base an opinion had been given, that he thought the testator was of sound mind. The witness, then, further testified that they had spoken of some papers the testator had written and read before medical societies, of his views upon those subjects, and of the commendation with which his papers had been received by the listeners; that testator was fond of quoting poetry by noted authors, and also his own poetry, and that witness talked about his physical condition, whereupon, over the like objection and exception, the witness was allowed to testify that he had noticed no intimation of impairment of intellect. On cross-examination, the witness testified that testator had been confirmed as a member of his church about Easter, 1902; that he did not remember seeing him during the first of the two summers after that time; that he remembered no interviews nor conversations with him during the summer of 1903; that the witness never studied medicine; and, although the views expressed by the testator upon medical subjects seemed reasonable to witness, he knew nothing about them; that he did not know whether testator had read any papers before medical societies or not; that he told witness he had read them, but that he does not remember whether he told him that he had read any within twenty-five years before their acquaintance, and that he did not know whether testator's views were commended by medical men or not. Whereupon caveator renewed the motion to strike out the opinion testimony of the witness, on the

ground that it further appeared that no sufficient foundation for the admission of his opinion had been given, which motion the court overruled, and an exception was duly noted.

To contrast the ruling of the court embodied in the first assignment of error with the rulings on the six now under consideration:

In the former, a witness who had repeatedly had occasion to confer with testator and his sister about work to be done upon their property, who testified that, on these occasions, the testator seemed not to know or to understand what he wanted done, would be told by the sister to go away, that she would attend to it, that he was forgetful, incoherent and disconnected in his conversation, and that, at or about the date of the will, the witness had an interview with him about the purchase of a piece of property, at which his sister would direct him to cease talking, that she would do the talking, that the testator would, nevertheless, break in and talk, but in a manner showing he did not understand the transaction, and as if he did not know what he wanted, though detailing particularly to the jury the circumstances which led him to form an opinion as to testator's mental capacity, was held by the court not to have given sufficient ground upon which to testify as to his opinion, and to be incompetent to do so.

In the latter, six witnesses, no one of whom testified to any act, statement or occurrence, done, made or participated in by the testator, from which the jury could judge as to the sufficiency or insufficiency of the foundation for the opinion of the witness, were allowed, nevertheless, to give their opinion upon the very issue which it was the function of the jury to decide, namely, whether the testator was of sound mind, capable of transacting his business affairs.

The utmost result of the testimony of the witnesses in question was, to lay before the jury the fact that they had

had opportunities of intercourse with the testator, and that, by reason of what transpired at these interviews, they had formed the opinion expressed as to his mental capacity—not only without informing the jury of the grounds upon which their opinions were formed, as, for example, what the testator said or did, but some of them, in terms, testifying that they could not recall anything he had ever said to them, that they had never heard him speak of any kind of business, that they had no knowledge of any business transacted by him, and that they could recall no subjects they had discussed with him, etc.

It was claimed below that, in Connecticut Mutual Life Ins. Co. vs. Lathrop, 111 U. S., 609, 920, the opinion of a witness formed from the minute circumstances which make up the conduct of another is, itself, in its essence a fact, and admissible as such in evidence. Such is the effect of that decision, but subject to the qualification that, although the witness can not be expected to charge his memory with and communicate all the circumstances which he observed, the jury must, nevertheless, be informed as to his "opportunities to know all the circumstances, and *of the reasons upon which he rests his statement as to the ultimate general fact of sanity or insanity*," so that it may be able to *"test the accuracy or soundness of the opinion expressed, and thus, by using the ordinary means for the ascertainment of truth, reach the ends of substantial justice."*

In the case of the caveator's witness Coomb, this was duly done. In the case of Mrs. Johnson, Mrs. Causey, Mrs. Osmun, Mr. Thompson and others, what were the reasons given upon which they rested their statements as to the ultimate fact of sanity or insanity, or which afforded the jury any means of testing the accuracy or soundness of the opinions expressed? How do they differ from the "mere naked opinion" of persons, neither attesting witnesses nor medical men, declared by the Court of Appeals, itself, to be

"inadmissible in reference to the mental capacity of the testator whose will may be controverted"?

Robinson vs. Duvall, 27 App. D. C., 535, 547.

The court below, in Raub vs. Carpenter, 17 D. C. Ap., 505, 513, construed Ins. Co. vs. Lathrop, 111 U. S., 612, as requiring disclosure by the witness, even though a medical man, of the facts upon which his opinion was based, as a necessary prerequisite to the competency of his opinion, and was sustained in so doing by this court. 187 U. S., 159, 160-1.

Yet, in the present case, the foregoing assignments of error are disposed of by the enunciation of a new rule which as applied to the qualifications of the caveatee's witnesses amounts to this: A half dozen social visits of short duration and at long intervals entitles a lay witness to express an opinion that the testator was sane and "capable of attending to business" (Rec., p. 20). In support of the new rule thus announced two decisions of this court are cited and one quoted from at length, to-wit: Connecticut Mut. Life Ins. Co. vs. Lathrop, 111 U. S., 612, and Queenan vs. Oklahoma, 190 U. S., 548. In the first of these cases the issue was raised by the replication of insanity to a plea of breach of covenant against suicide contained in the insurance policy sued upon. The exception was to the statements of his impression by a witness who had previously testified (See opinion, p. 616, Connecticut Mutual Life Ins. Co. vs. Lathrop).

> "A. He asked for a glass of wine, and I gave it to him. He said he had not had a drink yet that day or since the one he had last night from me, that was a glass of wine. He said, 'I may look queer this morning or drunk to other people, but I ain't drunk.' He said, 'Some people may think me drunk but I am not. I am not drunk in my body but I am in my mind.' He looked unusual to me. He had on his old clothes and

his necktie was out of shape, his face was red and his eyes staring at me which made me think he was quite out of his usual way. His appearance and look was quite different from his usual appearance prior to that time. He looked in his face quite red and his eyes had quite another expression. He had them open wide with a look that was wild and he looked around the room a while and walked up and down and seemed very restless. He would not stand at one place like he usually did, but walked up and down."

It is submitted that the utmost extent to which the view of the court below finds support in these two opinions of the court must be limited to holding, e. g., in the case of the witness Johnson (Rec., p. 20), that at none of the times she saw the testator and heard him talk "of his profession, poetry or something that was beautiful and interesting" had she been impressed by anything peculiar or indicating mental unsoundness. It certainly is stretching the doctrine of this court to great lengths to hold that upon the basis of talks about his profession, which he had abandoned twenty years before, or about "poetry or something else equally beautiful and interesting," this witness could enlighten the jury by an opinion whether "he could transact business."

It is also noticeable in the two decisions of this court cited by the court below, the testimony offered was positive and not negative. The impression made upon a lay witness by demeanor and appearance altogether *abnormal* may well be received although he has seen the testator but once and for a few minutes, the impression being the summing up of numerous details beyond the powers of description of a lay witness, whereas if the impressions of numerous lay witnesses, selected because of the negative character of their observation, are to be permitted to be urged upon the jury, the only effect of such a procedure must be to mislead them. It is submitted that the existence of a legal presump-

tion in favor of sanity, as the normal condition, although entitled to great weight with the court and jury, can not possibly effect what writers on evidence call the "experiential capacity" of a witness.

There is an additional reason why witnesses who predicate their judgment of a man's sanity or insanity on a few conversations had with him should be required to give at least the substance of them, and this reason is well exemplified in the testimony of this case. Gilbert Thompson, a witness of the caveatees, did testify to what the testator talked to him about (Rec., p. 33):

> "That he told witness he had practically disowned his nephew, had tried to do all he could for him; that he had found him in New York, purchasing clothing, brought him here, tried to start him in his profession, gave him an office; that he had no visible means of support in New York and was living around there in a haphazard way at tramp boarding houses."

From this and other conversations testified to by this witness he was permitted without objection to give his opinion. The caveator later proved by disinterested witnesses that these statements of the testator in this conversation had not the slightest foundation in fact, any more than his statement to Gawler, the undertaker, that his nephew had received more than he was entitled to, when in point of fact the uncle had profited many thousands of dollars through the nephew's desire to humor or gratify him (Rec., p. 155).

XII—XIV.

The next three assignments of error relate to the exclusion of certain testimony offered, bearing upon the relation of the testator to his wife, Mrs. Anna L. Woodbury.

After a marriage experience of several years, which the

testimony of witnesses both for the caveator and for the caveatees tends to prove the testator referred to as having been happy (Record, pp. 8-22), and without there ever having been any difficulty or quarrel between them, he separated from her and instituted a suit for divorce. The caveator offered the record of this suit in evidence to show that he was even at that early date subject to the most impossible delusions consistent with sanity, claiming in his said divorce suit, contrary to the fact as established by physicians appointed by the court to examine and report upon it, that his said wife was the victim of a physical malformation which rendered her incapable of a valid marriage, he never having visited or spoken to her during the thirty years which intervened until his death, notwithstanding the utter groundlessness of this, the only charge in the suit—the uncontroverted fact, shown by the testimony on behalf of the caveatees themselves, being that he was truthful, conscientious and religious. The exclusion of this evidence is the subject of the twelfth assignment of error.

Notwithstanding the rejection of the evidence above referred to, upon the objection that it was too remote (Record, p. 9), an agreement between the testator and the said wife, executed in the year 1887, fifteen years before the date of the execution of his will, was offered in evidence, was objected to on the ground that the divorce suit had been excluded as being too remote, in which case this agreement was, also, incompetent. It was urged in support of the offer that the caveatees had "a right to show the relations existing between Dr. Woodbury and members of his family," the only members referred to in the agreement being himself and his wife, and their relations, as pointed out in the objection, having terminated with the divorce suit thirty years before his death, the record of which had been and was excluded—over which objection and exception the agreement in question was received in evidence (Record, p.

37-39), this constituting the fourteenth assignment of error.

Thereupon, the caveator at pp. 55-6, offered the testimony of the wife, as explanatory of her action in executing the agreement in question, that she had been advised by physicians and others that her said husband was the victim of a mania; that she must not oppose him in anything, and that he wished the paper executed. The court rejected the testimony, holding, in effect, that a transaction by the wife with the husband was admissible as tending to prove that she regarded him as capable of transacting business, but that testimony as to the circumstances of the transaction, and of the causes which led to her action and explanatory of it, were not admissible. Its error, we submit, is too obvious to require discussion, this ruling being covered by the fourteenth assignment of error.

XV.

At page 37 of the Record, a deed from the testator and his wife to the American Security and Trust Company, executed November 18, 1903 (Record, pp. 54-5), was introduced by the caveatees, for the purpose of showing that she dealt with him as capable of executing a deed. The exclusion by the court of the testimony of Mrs. Woodbury as to why she joined in the execution of this deed is the subject of the fifteenth assignment of error.

That these rulings, and each of them, were erroneous, we submit, is plain. The testimony in regard to the divorce suit, it is true, reaches back thirty years, but, during all those intervening years, the testator continued to live apart from his wife, without speaking to or communicating with her, the evidence tending to show that there had never been any quarrel or difficulty between them, or any complaint upon his part, except that set up in his bill for divorce, which could only be an insane delusion if the testimony of

the caveatees as to his character was correct, and which, in any event, was strong evidence of insane and continuing delusion, which the caveator was entitled to submit to the jury. With respect to the two deeds, it is inconceivable that testimony could be offered as tending to show the relations between the testator and his wife, or the manner in which she dealt with him, and yet testimony explanatory of her execution of them be inadmissible.

These assignments of error cannot be lightly brushed aside and disregarded as was done by the court below. The wife of the testator was one of the natural objects of his affection and bounty, the insult intended by the legacy of ten dollars was the result of a long enforced separation which had its inception in an insane delusion of the most pronounced character. Had they come together again it might well have been contended that the testator had recovered his mental health and that the delusion was too remote in point of time to throw any light upon the ten-dollar legacy. The testator, however, persisted in this delusion, varied with the belief of her death at different times, of his divorce from her at other times, and at still others made efforts to have her relinquish any claim on him for alimony or dower. To overcome this quite conclusive evidence of the testator's mental unsoundness, the caveatees offer in evidence certain instruments in writing by which the caveator Mrs. Woodbury purports to transact business with her husband as a rational being. When the caveator offers the wife's explanation for this seeming inconsistent conduct on her part in so dealing with him—that it was out of the tender regard which she still had for him and on the advice of physicians, who knew them both, that to refuse to comply with his requests would endanger his life in the condition in which he was—the explanation is excluded on the ground that it involves hearsay. The net result of these several rulings of the trial court, taken together, is

that, of all his extraordinary relations with his wife, everything is excluded except two deeds offered to show that she at least always regarded him as sane.

XVI.

The sixteenth assignment of error relates to an incident of the trial which will be found at pages 16-17 of the Record. The caveator, on cross-examination, was asked whether he had not applied certain profane and injurious expressions to his aunt, Miss Sally Woodbury, and denied that he had done so. Upon this he was asked whether his aunt was a truthful woman, to which she answered she was, though he had known instances of her stating things which he did not consider exactly true. He was then shown a paper, purporting to be a letter addressed by her to his uncle, William H. Turner, and, having identified this letter as being in her handwriting, the court, over objection and exception, permitted him to be cross-examined in respect to its statements, and, also, admitted the letter in evidence to the jury, charging him with "base ingratitude, insult and injury," claiming that the writer feared personal harm from him, and that he had used the profane and insulting language about which he had been interrogated.

As stated, this testimony was introduced upon the cross-examination of the caveator, in connection with the evidence on his behalf attacking the will. Having been admitted in evidence to the jury, it was followed by the further case of the caveator, then by all the testimony for the caveatees, and by the testimony in rebuttal, the trial consuming several days, at the end of which (Record, p. 59), the court instructed the jury that, while the caveator had been allowed to be cross-examined as to the statements in that letter, it was not to be taken as evidence of the truth of the statements which it contained. Even if, at this late

stage, the letter had been stricken out and the jury instructed to disregard it, the error would not have been cured. Its inadmissible, damaging statements had been allowed to remain in the minds of the jury for some days, manifestly to his great prejudice, and an order to strike out would then have been too late. Throckmorton vs. Holt, 180 U. S., 552, 567.

But the letter was not withdrawn. It was left in the case, and as a part of the evidence to be considered by the jury, who were simply instructed, at that late stage, that it was not to be taken as evidence of the truth of the statements contained in it, leaving them to draw such inferences and conclusions from it, and to attach such influence and importance to it with respect to the purposes for which it was available as they might do in view of the fact that it was admitted by the court as competent evidence to be adduced before them.

In Washington Gas Light Company vs. Lansden, 170 U. S., 535, certain evidence as to the resources of a defendant in a libel suit was admitted by the court tentatively only, as competent if punitive damages should, when the testimony was all in, appear admissible. At the conclusion of the trial, the court instructed the jury to render compensatory damages only, but the judgment in the case was reversed on the ground that the testimony in question had not been specifically withdrawn. The case at bar is infinitely stronger.

XVII.

The court erred in refusing to grant the instruction prayed by the caveator that the deed from testator to the witness, Mena M. Stevens, executed in September, 1904 (Record, p. 53-4), was in the nature of a testamentary instrument, which might be considered in connection with the

manner in which he had disposed of his estate, and, also, as bearing upon the interest of the witness Stevens in the question involved in the suit. The testimony with respect to this deed, as shown by Miss Stevens, herself, was that he had first executed a similar deed to her, which he had placed in the hands of Col. Blount, to be given to her and recorded after his death; that he subsequently took it back from Col. Blount, then lost it, both of them having hunted all over the house without having been able to find it, that he then executed the deed in question, and again gave it to Col. Blount to keep until his death, the grantee not to have the property until his decease. The property was worth about $4,000.00, and she had received from him during the time she was his nurse and housekeeper $2,300.00 additional in Washington Gas stock and certificates, she having been employed in the capacity stated from December, 1902, until his death in January, 1905, and her wages before coming to him having been $8.00 per month. It further appeared that in May, 1904, the testator had placed the deed, which had been recalled from the possession of Mr. Blount, in the hands of S. H. Robison, to hold subject to his orders while he lived, and after his death, to be destroyed if the income of Mrs. Stevens from the stocks and bonds should exceed $16.00 per month.

The court, at page 54, instructed the jury that the manner in which the testator disposed of his estate by the will and codicils might be considered by them in connection with the other evidence in the case, as bearing upon the question of his mental capacity. This instruction was granted without objection, and has always been recognized as one correct and proper to be given. But the disposition made by the testator of the property embraced in the Stevens deed was as much a part of the general disposition made by him of his estate, under the same conditions, as if that disposition had been contained in the will instead of the deed,

The latter was to have no effect while the testator lived. It was to be subject to his control during his life, and it was to vest that portion of his estate in the grantee at the time, and as gratuitously as any portion of his estate was to devolve upon the beneficiaries under the will. If it was correct for the jury to consider the manner in which that portion of his estate which was embraced in his will was disposed of by him, it was equally proper for it to consider the disposition made by him of the remaining portion of his estate, taking effect at the same time and precisely the like in character in every essential particular.

XVIII—XIX.

The 18th assignment of error is to the granting by the court, over the caveator's objection, of prayer numbered 6, at page 57 of the Record, while the 19th is to the granting, over objection and exception, of the prayer numbered 13 on the same page. The objections to the granting of these instructions are specifically stated in the record, at pages 57-8, and this brief will not be protracted by an elaboration of them. It is submitted that they were well taken, and that the granting of the instructions was erroneous.

We respectfully submit that, in the several particulars above pointed out, there was error in the rulings of the trial court, gravely prejudicial to the appellant, and that the judgment of the Court of Appeals affirming its judgment should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 101.

MOLYNEAUX L. TURNER, APPELLANT AND PLAINTIFF IN ERROR,

vs.

AMERICAN SECURITY AND TRUST COMPANY, THE CHILDREN'S HOSPITAL, AND THE GARFIELD MEMORIAL HOSPITAL.

Brief for Appellees and Defendants in Error.

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Statement of the Case.

Henry E. Woodbury, whose will (Rec., pp. 23–30) is now in contest, died January 15, 1905, at the age of 79 years. He had married about 1870, but in 1872 he and his wife, who survived him, separated and did not thereafter see each other. In 1887 they joined in a deed each releasing all interest in the other's property.

The testator had been a successful practicing physician, but in 1881, by reason of a fall, sustained serious injuries which led him to retire from practice. He, nevertheless, retained his interest in and fondness for medicine throughout his life, as will be referred to later, and although quite feeble physically, by no means lived an idle

life. He owned several houses and gave his personal attention to their rental and repair, keeping in close touch with his agents, Bardroff, Shields, and Edwards (Rec., pp. 30, 43, 51). In the case of many repairs, he dealt directly with the laborers, requiring an estimate before he would order the work done (Rec., p. 49). He also made extensive purchases of stock at various times during the years in which the will and codicils in question were executed and paid for the same by check on the American Security and Trust Company. He had frequent business dealings with the president and trust officer of this company, and his checks on his account on deposit there were cashed without question. The last of these checks is dated but ten days prior to Dr. Woodbury's death (Rec., pp. 50, 51). In the minds of these parties, produced by the caveatees, with whom he had these various business transactions, there was no question that he was of sound mind and capable of transacting business.

He was also a man of intellectual tastes, fond of literature, composed poetry, a specimen of which is found on page 43 of the record (introduced by Doctor, now Bishop, Harding in his testimony in behalf of the caveatees), and discussed with his friends and acquaintances a wide range of subjects, church, topics of the day, his profession, masonry, patriotic societies, mutual friends, etc. About 1899, he read a paper before a meeting of the Sons of the American Revolution, which was received with applause, and in 1902–3, he acted as executor of his sister's estate. He was physically feeble, suffered with chronic bronchitis and deafness, which would account for seeming peculiarities, or failure to understand conversations, such as testified to by the witness Coombs; but his mind was clear and he was able to attend to business almost to the day of his death. Twelve witnesses, four of whom were physicians, viz: Doctors N. S. Graham, Foster, Z. T. Sowers, and Henry

Deale (Rec., pp. 31–33), testified without objection that he was of sound mind and capable of attending to business.

The testator had no children, but left, as his sole heir at law and next of kin, a nephew, Dr. Molyneaux Turner, the appellant. Dr. Turner was born in 1870, and graduated in medicine in 1893. The fall of the latter year he received a position without pay at the Children's Hospital in New York, where he remained until April, 1894, when he procured a position as physician with the Netherlands Line. He continued in this position for one year, receiving $50 a month, room and board. In 1895 he opened an office for the practice of medicine in New York, but in January of the following year, on account of his Uncle Edward's health, he gave up his office and came to Washington, where he lived with the testator till August, 1896, when he was appointed on the staff of the Emergency Hospital. He remained there till September, 1897, receiving his room and board, but no pay except during the last four months, when he received $25 a month. In November he obtained a position as physician with the Panama Canal Company, which paid him $50 a month, expenses and tips, but he resigned the summer of 1898, and in the fall procured an appointment as surgeon in the Army. Here he received $150 a month, mileage and quarters, but in June, 1900, he resigned to avoid going to the Philippines. He lived with his father in New York till February, 1901, when he came to Washington and resided with the testator, who in June gave him a room in which to open an office. In August, 1901, he went to live with Mrs. Woodbury, the wife of the testator, and has remained there, looking after her properties, and acting as treasurer and director of a mining company in which he and his aunt were interested, though he received no salary therefor. He had no regular office for the practice of medicine, but used

the office of the mining company; did not put out a sign as physician, but gave out cards to his friends. He received an appointment without salary, as Assistant Demonstrator of Anatomy on the faculty of the Medical Department of the Georgetown University, but resigned this position about two years ago upon receiving an appointment in the Chemical Laboratory of the Agricultural Department (Rec., pp. 12, 14, 42).

Dr. Woodbury had desired to teach his nephew business methods, bookkeeping, banking, the writing of deeds, etc.; it was with a view to teaching him business that he had given him 75 cents a week and had wanted him to write in a little book what he had bought with it. He was worried on one or two occasions because he thought he was going beyond his income, and would say he would have to be economical (Rec., p. 35).

Dr. Woodbury's interest in medicine did not cease with his retirement from the practice; he liked to talk of the work of his profession, and hoped to have his nephew follow in his footsteps and establish himself in the practice. But Dr. Turner thought he knew better than his uncle how to make his way, and so followed the varying course before outlined, with the result that his practice has not yet been established (Rec., p. 42). Thus Dr. Woodbury's feelings, which had been very friendly toward his nephew, changed, and became more or less bitter as he saw his hopes and plans frustrated (Rec., pp. 10, 11, 14, 15, 33, 34, 45).

Miss Sallie Woodbury, Dr. Woodbury's sister, lived with him till her death, December 18, 1902. By her will she left him all of her property, real and personal, subject only to a bequest of $100, to Dr. Turner. She had intended to make other small bequests, but changed her mind because she wished Dr. Woodbury to have all her

property, and instead asked him to provide for these bequests in his will, which he did, executing for that purpose Codicil No. 1 (Rec., pp. 25, 45–49).

Will and Codicils.

Dr. Woodbury's original disposition of his property by the will of April 11, 1902 (Rec., p. 23), gave to his sister Sallie the life use of practically all of his property, to Dr. Turner $100, a gold watch, and a one-fourth interest in house and premises numbered 912 Twelfth street northwest, in the City of Washington, D. C. This will then states:

> "Said house was given by me to his grandmother, Mary A. Woodbury, and is held by me now, as a trust, by deed from her. This one-fourth interest would have been the share of his mother, Margaret M. Turner, were she now living." . . .
>
> "The reasons for not remembering my nephew more generously,—are deliberate and decided,—he having forfeited all claim to my consideration by his ingratitude and indifference, thereby embitteringthe closing years of my life."

Concerning testator's widow, the following provision occurs:

> "4th. I give to my wife, Anna L. Woodbury, the sum of ten dollars, she having been satisfactorily provided for some years ago, out of my estate,—as per decree of the Equity Court of D. C., in the settlement of Cause No. 2089, Equity Docket No. 10."

Dr. Woodbury, the testator, knew his nephew and anticipated that he would endeavor to set aside his will after his death. He provided against his nephew's attack as far as he could by a provision in the will itself and

the request made of his attending physician. The will provides (Rec., p. 24):

> "8th. Should any party whatsoever attempt to break this my last will, I direct my executors to spare no pains or expense, in defeating that purpose, and in having this my last will, sustained and established by the courts."

And Dr. Sowers' testimony (Rec., p. 32) is as follows:

> "Dr. Z. T. Sowers, a physician called on behalf of the caveatees, testified that he had attended testator for a number of years, continuing until about a year before his death, seeing him about two or three times a week during his illnesses; that he was quite feeble, had chronic bronchitis, chronic sciatica, and in a generally miserable condition, but that his mental condition was clear—an unusually bright man—and that witness noticed no impairment of his intellectual faculties; that he frequently told witness he had practically disinherited his nephew; that he was sure the latter would contest his will, and wanted witness to testify to his ability to make it, and his intention to disinherit him, and that in witness' opinion he was of sound mind and capable of executing a valid deed or contract."

The Washington Home for Incurables is made the residuary legatee under this will (Rec., pp. 23, 24).

The first codicil (Rec., p. 25), which was made on January 5, 1903, was necessary, as therein stated, in order to comply with certain requests of his sister, Sallie, that he provide for several bequests which she had refrained from making in her own will, because she wished Dr. Woodbury to have the use of the money while he lived.

There are two codicils numbered 2. The first was executed October 30, 1903, and revoked the clause giving the one-fourth interest in the Twelfth street house to

Dr. Turner, for the reason, as there stated, that Dr. Woodbury had purchased that interest from Dr. Turner. The other codicil numbered 2 was executed December 21, 1903, and is largely a repetition of the one just preceding, except for a request to the judge of probate that he enter an order providing for carrying out certain wishes of the testator as to the destruction of his papers (Rec., pp. 26–28).

The next codicil, executed February 18, 1904, revoked the residuary devise and bequest to the Washington Home for Incurables, and gave all the rest and residue of the testator's estate, real and personal, after the payment of several small bequests, to the Garfield Hospital of the District of Columbia and to the Children's Hospital of the District of Columbia, share and share alike (Rec., pp. 28–29). The reason for this change is clearly explained by Charles J. Bell, president of the American Security and Trust Company, whom Dr. Woodbury told he had left a legacy to the Home for Incurables; he afterwards informed Mr. Bell that he had written to the lady in charge, the president of the hospital, for certain information, but they having ignored his letters, he had decided to strike out that legacy and give it to another charity, and he was very much hurt that the ladies had not paid attention to the letters or letter—the witness did not remember whether there was one or more (Rec., pp. 51–52).

The fourth and last codicil, executed December 20, 1904, was executed simply for the purpose of having the American Security and Trust Company, the executor, instead of Mr. and Mrs. Robeson, assist Miss Stevens in destroying the testator's papers (Rec., p. 29).

The reason for and the reasonableness of the foregoing provisions of Dr. Woodbury's will and codicils call for but brief discussion.

As Dr. Turner testified, his—

> "uncle and aunt were desirous that he should stay with them, and establish himself in the practice of medicine, but witness regarded being with corporations as being a stepping stone and method of establishing himself in the practice of medicine" (Rec., p. 42).

When he pursued the course or courses, he did, as already referred to, and frustrated his uncle's hopes for his future, the reasons for the provisions concerning him are not far to seek. It is, perhaps, also worthy of note that Miss Sallie Woodbury, Dr. Turner's aunt, left him $100 in her will, and that the testator referred to this, saying he had left Dr. Turner $100, the same as his brother and sister had done (Rec., p. 36). Further reason for the slight provision for Dr. Turner is found in Dr. Sowers' testimony (Rec., p. 32). With Dr. Turner thus practically excluded from the estate, and in view of the close friendship existing between the testator and his sister and of his fondness for and interest in his profession, the provisions for Miss Woodbury, in case she survived him, and the bequests to the hospitals are readily understood. The reasons for leaving Mrs. Woodbury only $10 are given in the will of April 11, 1902—that is, that she had been satisfactorily provided for in an equity suit.

No recourse to the theory of undue influence is necessary to explain this will and the codicils; in fact, they are clearly inconsistent with any such theory.

Miss Stevens, who after his sister's death acted as Dr. Woodbury's housekeeper and nurse from the last of December, 1902, till his death in January, 1905, and upon whose undue influence the principal stress seems to be laid by appellant, receives not a penny under the will, nor does the will make any provisions by which she benefits even indirectly. The only material changes made in

the will after Miss Stevens went to Dr. Woodbury's are due, first, to Miss Woodbury's death, and, second, to the failure of the Home for Incurables to reply to Dr. Woodbury's letter. His intention, after making proper provisions for Miss Woodbury in case she survived him, to leave the bulk of his estate to charity, in the form of hospitals, is seen to run consistently, from April 11, 1902, to December 20, 1904, through the will and five codicils, and his intention is not changed when Miss Stevens appears.

Appellant seeks to remove this objection by bringing in the fact that although Dr. Woodbury left Miss Stevens nothing by his will, he gave her a house worth about $4,000, and about $2,300 worth of gas stock. As to this, Miss Stevens testified that after she had been at the testator's house a few weeks, he asked her if she preferred to have him pay her a salary, or to have him pay her in his own way, and that she left it entirely with him (Rec., p. 35). In other words, she received $6,300, for over two years care and nursing of an old man, physically feeble and for the last year confined to the house and much of the time to his bed.

ARGUMENT.

The record contains all the testimony (Rec., pp. 52 and 56). "Thereupon the caveators rested, and all the testimony given by them during the progress of the said cause is hereinbefore set forth."

I–XI.

The appellant's assignments of error numbered I–XI can be conveniently considered together.

As to the first assignment, based upon the exclusion of the testimony of the witness Charles Coomb, a painter,

of his opinion as to the mental capacity of the testator, an examination of his testimony, as found on page 8 of the record, shows that on two or three occasions, perhaps a year apart, when witness went to do work, principally for Miss Sallie Woodbury, testator would talk about it, but would not seem to understand it; would forget and talk about different things, and, when witness *last saw him, in 1901 or 1902*, (testator died January 15, 1905), in regard to buying a house of his, witness talked with the sister mostly, who would tell the testator to stop and she would do the talking; but he would talk now and then about it; that he seemed not to understand it, as if he did not know what he meant. It will be seen that the subject of the conversation is given, but nothing of the substance. We shall discuss the legal side of this exception a little later, but we must object to the statement found on page 13 of appellant's brief, that, under the ruling of the court on this point, the caveator was able to introduce the opinion evidence of only two lay witnesses upon this, the most important point in the case, being unable to use any of his witnesses whose dealings with the testator were not of a more intimate character than those of the witness Coomb. We respectfully submit that none of the witnesses whom appellant thus claims he was unable to use were put upon the stand at the trial, nor was any offer made of their testimony. There is nothing whatever in the record to justify this statement in appellant's brief.

II & III.

Mrs. Emma M. Johnson (Rec., p. 20) was allowed, over appellant's objection, to state that testator's "mental condition did not seem to be impaired at all," and that she thought he was capable of attending to business, and the court refused appellant's motion to strike out this testimony. She had previously testified that she

had known the testator for nearly thirty years, during part of which time he had been her attending physician; that during the last six or eight years of his life she had seen him perhaps once in every six months or so, and during his last illness she called at his house several times; last saw him about three weeks before his death.

IV.

Mrs. Foster Causey (Rec., p. 21) testified that she had known testator all her life; that she had seen him four or five times during the last five years of his life at his residence; that he had been the physician of witness' family; during the last five years of his life had been a man of wonderful memory, especially for his home life in New Hampshire; would repeat at witness' request his own poetry; had a sweet voice and would sing; whereupon the court allowed her, over appellant's objection, to state that she thought testator was capable of attending to business.

V.

Mrs. Louise Thompson (Rec., p. 22) testified that she had met the testator the summer before his death, that she had seen him probably six times, that he generally spoke of his memories of the civil war and of witness' father, who was an army surgeon with the testator during that time; that he sometimes spoke of his home life as having been very happy and bright, but that he was left alone and drawing near his end, whereupon, over appellant's objection, witness was allowed to state that testator was very clear in mind and that she did not notice any impairment of intellect at all.

VI.

John C. Bardroff (Rec., p. 30), who was a witness to codicil No. 4 (Rec., p. 30), testified that he had been employed in the office of Mr. Shields, a real estate agent,

who had charge of one piece of property belonging to the testator, and had very often carried the rent to the testator; at other times used to see him to tell him of the condition of his property; on these occasions conversing with him about his property, his different houses, and other topics, and also made social calls; that witness could not remember just what they talked about, that they talked about the topics of the day, masonry, and the accident which had happened to the testator; whereupon witness, over appellant's objection, was allowed to state, "His mental condition, so far as I know and observed, was good. He was a very bright man."

VII & VIII.

Mrs. Margaret Osmun (Rec., pp. 30–31) testified that she had known the testator from fifteen to twenty years; that he would call at her house quite often; that she had visited him every few weeks at his home after he became ill; that he would talk about himself, his sister, witness' mother, who was an old lady and an invalid of whom he was very fond, about the topics of the day, a great deal about his profession, and on various topics, about his insurance and his agents; whereupon, over appellant's objection, witness stated that she did not at any time notice any impairment of his intellect, and to the question, "Was he competent, in your opinion, to execute a valid deed or contract?" she was permitted to answer, "I think he was competent in anything of that kind. I believe he was; he was competent to attend to business." Upon cross-examination witness testified that she could not recall or state any conversation she had had with testator; that he had spoken of money affairs, and things of that sort, but she could not recall any; that she could not recall any of the topics of the day he had spoken of with her, nor anything he had said about his houses; that he used to tell her about the repairs,

but she could not remember anything he had said to her about them; whereupon the appellant moved to strike out the aforesaid answers of the witness as to the mental competency of the testator, which motion the court overruled.

IX.

Rev. E. M. Thompson (Rec., pp. 40–41) testified that he was the assistant rector of St. Paul's church, of which the testator became a member about two years before his death; that witness visited him during the summer months, during the years of 1903 and 1904; that the subjects of conversation would be of a various character, sometimes about his physical condition, sometimes his literary attainments and accomplishments, sometimes his own private affairs; that when witness first knew him he was going around and seemed to be quite active, but in the last year of his life, witness thought he was in bed most of the time; whereupon, over appellant's objection, witness was allowed to state, in answer to the question, "How was his mental condition?": "I think he was sound." The witness further testified that the testator had spoken of some papers he had written and read before medical societies, and of some of his own particular views upon those subjects, and of the commendation with which these papers were received by the listeners; that he was very fond of reciting poetry by noted authors and his own poetry; that he talked with witness about his physical condition; whereupon, over appellant's objection, witness was allowed to testify that he did not, at any time, during his visits to the testator, notice any indication of impairment of intellect.

On cross-examination the witness did not remember that he saw anything of the testator during the first of these two summers; that he remembered no interviews or conversations with him during the summer of 1903;

that he had never studied medicine, and, although the views upon medical subjects expressed by the testator seemed to be reasonable, he knew nothing about them except what he had heard as a layman; that he did not know, as a matter of fact, whether the testator had read any papers before medical societies; that he told witness he had read them; that he does not remember whether he told him he had read them twenty-five years before he knew him; that it seemed to witness more recent than that; that he does not recall the date at all; that he does not know whether testator's views were commended by medical men or not; whereupon appellant renewed his motion to strike out the testimony of this witness, as to the mental condition of the testator, which motion the court overruled.

XI.

Charles J. Shields (Rec., p. 43) testified that he knew the testator for five or six years before his death, and for the last three years before his death was agent for his house, No. 421 New Jersey avenue, southeast; he first talked with testator about stock he was interested in, and later talked with him about tenants and troubles with his house and repairs. It was after this that testator turned over the house to witness to rent; witness again saw him two or three times a month at first, later once or twice in three or four months, until about six months before his death, when he saw him more frequently at his home; spoke with him on a variety of subjects after the business in hand was disposed of; whereupon, over appellant's objection, the witness was allowed to testify "I think he was a man of perfectly clear mind."

The question of law, raised in each of the first eleven assignments of error, is, what foundation does the law require a non-expert witness to lay before he can be

allowed to state his opinion as to the sanity or insanity of a party whose mental condition is in issue. Appellant contends that the testimony of Coomb should have been admitted upon the foundation laid, but that the testimony of Mrs. Johnson, Mrs. Causey, Mrs. Thompson, John C. Bardroff, Mrs. Osmun, E. M. Thompson, and Charles J. Shields, as to the testator's mental capacity, should have been excluded because no sufficient foundation was shown. In support of this contention appellant relies principally upon the case of *Connecticut Mutual Life Insurance Company* vs. *Lathrop*, 111 U. S., 612.

An examination of this case shows that the court treated it as an open question whether or not a non-expert witness could, upon any foundation, be allowed to give an opinion as to the sanity or insanity of a person; and, after recognizing the diversity of opinion of the decisions upon this point in the various States, decided that the better rule, and the one which the Federal courts should follow, is that such opinions, if based upon a proper foundation of facts, are admissible. The opinion does not undertake to lay down in any detail, what the foundation must be. And this view of the effect of that decision is sustained by the case of *Queenan* vs. *Oklahoma*, 190 U. S., 548, 549.

We submit that a different rule should apply as to the amount of foundation required for an opinion of sanity and an opinion of insanity. Sanity is the normal condition, and there is less probability that one having conversations or transactions with a sane person will remember the substance or details of such transactions or conversations, just because the person in question is sane and more or less like the usual run of mankind in his mental condition and general conduct. Insanity, on the other hand, means a departure from the normal, and one dealing with a party who is insane, may be more properly expected to be attracted by the peculiarities and abnormalities which appear in such insane person,

so that the same would be likely to remain in his memory. Further, to give an opinion that a person is sane, while in form positive testimony, is in reality negative, and amounts simply to saying that one observed nothing out of the normal or usual in such person. But to testify that a person is insane or of unsound mind, is to testify, not to a negative, but to a positive fact or opinion—that is, that the person in question is different or departs from the usual or normal condition of mankind. This distinction is clearly recognized in those cases where the point has been definitely presented.

Thus in the case of *Burney* vs. *Torrey*, 100 Ala., 157, 172–173, a contested will case, the court said:

> "We think the proper rule as to non-experts testifying upon the sanity or insanity of a person may be stated as follows: Where there has been that long and intimate acquaintance with another to enable the formation of a correct judgment as to the mental condition of such other person, a witness may give his opinion that the person is of *sound mind*. Sanity is the normal condition of mankind. The witness, with such opportunities, need not *in limine* be required to testify to the absence of facts which, if existing, would be evidence of insanity, before giving his opinion that the person is sane. To authorize a non-expert to give his opinion of the existence of an unsound condition of mind he must not only have had the opportunity to form a judgment, but the facts should be stated upon which it is based. The admission of opinion testimony is an exception to the general rule, and in our judgment the ends of justice require in all cases where the opinion of a non-expert is admissible to show unsoundness of mind, that the facts upon which it is predicated should be stated."

This case of *Burney* vs. *Torrey* was relied upon in the later case of *Murphree* vs. *Senn*, 107 Ala., 424, 428.

In the case of *Lamb* vs. *Lippincott*, 115 Mich., 611, 617, also a contested will case, the court said upon this same point:

> "Sanity is the rule; insanity the exception; and where it appears that a witness has known a person for a long time, and has never known anything unusual, either in his speech or actions, he is competent to express an opinion that the man is sane, because sane or normal acts and speech are consistent with the normal condition, sanity. Insanity, however, not being a normal condition, before one is competent to say that another is insane, he must state some fact that is inconsistent with sanity; and this is not done until the witness is able to testify to something that the man has said or done which fairly tends to show insanity. We are content with the rule as stated in *Prentis* vs. *Bates* and *People* vs. *Borgetto*, and we think that the trial judge did well to follow it."

Keeping in mind the principle that a fuller foundation is required to justify an opinion that a person is insane or unsound, than is necessary to justify an opinion of sanity, we return to the testimony of the witnesses on which these first eleven assignments are based.

As to the witness Coomb, the real substance of it is that on two or three occasions when he talked with the testator about certain work, he noticed that the testator did not seem to know what he wanted done or to understand it, and that on one other occasion, when witness talked with testator's sister about buying a certain house, the testator would talk now and then about it, but seemed not to understand it, as if he did not know what he meant. Reference is made to it here and the testimony briefly summarized, because it shows what the caveator considers a proper foundation for his own witnesses upon which to base opinion evidence.

In contrast with Coomb, who does not appear to have

been, in anywise, intimate or on friendly terms with the testator, we turn to the testimony of the seven witnesses of the caveatees whose opinion that the testator was mentally sound is claimed by the appellant to be unsupported by a sufficient foundation of fact. Without going over their testimony again, it may be observed that all of them were on friendly, and, we may almost say, intimate terms with the testator, as it appears that all of them called to see him at his house, at various times, on social visits, with the possible exception of Charles J. Shields, who saw witness quite frequently, extending over a period of some three years, and, during the last six months, saw him at his home and spoke with him on a variety of subjects after the business in hand was disposed of. Each of these seven witnesses had better and fuller opportunities of observation, and of forming an opinion as to the testator's mental condition than the witness Coomb, and yet the opinion that they have stated, namely, that the testator was sound in mind and capable of attending to business, under the authorities we have cited, requires a smaller foundation than the opinion which appellant had expected the witness, Coomb, to testify to.

On page 65 of the record it is noted that the caveators objected to the inclusion in the bill of exceptions, among other things, of the summary of the testimony of the witness, Charles J. Shields, but we note that the eleventh assignment of error is based upon the very testimony to which such objection was made.

As to the sixth assignment of error, based upon the testimony of John C. Bardroff, we would simply call attention to the fact that this witness is one of the subscribing witnesses to Codicil No. 4 (Rec., pp. 29, 30), and, of course, as such, is entitled to give his opinion as to the mental condition of the testator, without laying a foundation therefor, though, as a matter of fact, it ap-

pears that he had had much better opportunities than the witness Coomb to observe the testator.

The qualification of a non-expert witness is a question of fact for the trial court and where there is no abuse of discretion the decision of a trial court will not be interfered with.

Carpenter vs. *Hatch*, 64 N. H., 573.
People vs. *Levy*, 71 Cal., 618.
Denning vs. *Butcher*, 91 Iowa, 425.
O'Connor vs. *Madison*, 98 Mich., 183.

As to these eleven assignments of error, the instructions of the court as found on page 63 of the record, gave the jury an understanding of the proper weight to be given to the opinions of these witnesses, and we submit that the trial court has properly applied the law relating to opinion evidence, and that the time of this court should not be consumed in reviewing such rulings in the absence of a clear abuse of the discretion which the law places in the trial judge.

XII & XIII.

The twelfth assignment of error relates to the exclusion of the record of a divorce suit filed by the testator, in February, 1872. The will was executed on April 11, 1902, and the codicils at a later date. It is within the sound discretion of the trial court to limit the period over which evidence of testamentary capacity may be offered, and the exclusion of evidence relating to a time more than thirty years prior to the date of the will and codicils can not be called an abuse of this discretion.

Appellant attempts to obviate this difficulty by calling attention to the fact that the caveatees were allowed to introduce in evidence the agreement between the testator and his wife, executed in 1887, to show the relations existing between them. The thirteenth assignment

of error is based upon the admission of this testimony. But as the appellant had previously been allowed to give evidence relating to the injuries the testator sustained in 1881, six years prior to the agreement (Rec., p. 9), we submit the appellees were entitled to offer evidence within the period from 1881 down to the date of the will, but that the admission of this agreement did not entitle appellant to go back of it fifteen years. And in connection with the reasons for admitting the testimony as to the trial of the testator's action for personal injuries, counsel for the caveator said at the trial of this case, upon the point of connecting it with the time of the will, seventeen years later:

> "I will say frankly to your honor that the testimony we have already offered of Miss Arnold is perhaps the strongest we have on that subject. It will show that certainly, for ten years before this will was made, this condition continued" (Rec., pp. 41–42).

The fact that the testator's relations to his wife may have continued in practically the same condition for over thirty years cannot entitle this divorce record to admission in evidence when counsel make no more of a claim than that just quoted as to the effect of their evidence to connect the testator's mental condition in 1872 with the later period upon which testimony was given.

XIV & XV.

The fourteenth and fifteenth assignments of error are based upon the refusal of the trial court to allow Mrs. Woodbury, the testator's widow, to state what certain physicians had told her as to her husband's mental condition, the caveator having offered this evidence in explanation of her reason for executing the agreement of 1887 and joining with testator in the execution of the

deed of November 18, 1903, to the American Security and Trust Company (Rec., pp. 37, 54–56).

Assuming that the trial court might properly have allowed Mrs. Woodbury to testify that she executed these papers because of the belief or opinion she held as to the testator's mental condition, still it must have had an improper influence upon the jury to allow her to add to this the merest hearsay testimony that certain doctors had told her she must humor the testator, that he was suffering from mania, etc.

Counsel for the caveator, in offering this evidence, said to the court: "The doctors are all dead, and we therefore have to take her explanation." In many cases litigants lose the advantage of valuable testimony, through the death of witnesses where the law affords no remedy. And in this present case, there is no principle of law which, because of the death of these doctors, gives any additional value or sanctity to hearsay testimony of their opinions.

A will cannot be set aside by evidence of hearsay declarations of third parties.

Ormsby vs. *Webb*, 134 U. S., 47, 65–66.

XVI.

The sixteenth assignment of error is based upon the action of the trial court in permitting the caveator to be cross-examined in respect to the statements concerning him, contained in a letter written by his aunt (Rec., pp. 16, 17).

This was a letter in the handwriting of Sally Woodbury, addressed to William H. Turner, uncle of caveator, plaintiff in error, in which she made statements as to the brutal conduct o[illegible]e caveator to her when she was ill in bed. On cross-examination of the caveator, that portion of the letter was permitted to be read to the witness and he was asked, "Now do you mean that that

statement by her is untrue?" to which he answered, "*I don't remember* making any such statement. I am not in the habit of using any such language." The letter itself was not offered in evidence.

The instruction which the court gave the jury upon the matter (Rec., p. 59) is clear and points specifically to the testimony to which the caveator objected.

> . . . "neither the said letter nor the use thereof so allowed by the court to be made upon the cross-examination of the caveator is to be taken as evidence of the truth of any of the said statements in said letter contained or allowed to be used for the purpose of cross-examination as aforesaid."

In other words, the jury understood that this testimony simply bore upon the weight and credibility of the caveator's testimony, and such effect, if any, as was produced upon the minds of the jury, was almost entirely due to the caveator's halting answer, when asked if he had used certain profane expressions to his aunt, "I don't remember making any such statement. I am not in the habit of using any such language" (Rec., p. 17).

In the case of *Throckmorton* vs. *Holt*, 180 U. S., 552, 566–569, cited by appellant as bearing upon this assignment, the ground of the decision, that a certain instruction of the trial court withdrawing evidence improperly admitted was insufficient to cure the error, was that, in the instruction—

> "the names of the witnesses should have been given and the specific evidence which was given by them and which was to be withdrawn should have been pointed out."

In the present case, there was only one witness and the instruction was clear and specific.

Appellant also relies upon the case of *Washington Gas Light Company* vs. *Lansden*, 172 U. S., 535. In that case,

an action of libel, evidence was admitted tentatively, which bore only upon the question of punitive damages, and later in the trial the basis for its admission disappeared. There were several defendants and the evidence in question was as to the wealth of one of them. The trial court not only did not withdraw this evidence, after the basis for its admission disappeared, but did not even instruct the jury that it could only consider this evidence in connection with the question of punitive damages. The only instruction bearing upon the matter was that punitive damages should not be granted, and the Supreme Court said (p. 555):

> "Under such circumstances, in order to cure the error, the court, when deciding that punitive damages could not be recovered, should have plainly and in distinct language withdrawn this particular evidence from the jury. We can not be certain that its effect was removed by this action of the court. In a case of this character, where the line between compensatory and punitive damages is quite vague, and compensatory damages may be based upon the injury to the feelings and good name of a plaintiff, and where the amount even of such compensatory damages rests so largely in the discretion of a jury, we think it is utterly impossible to say that by merely charging the jury that punitive damages can not be recovered, the effect of the incompetent evidence as to the wealth of one of the defendants was thereby removed or that the verdict of the jury can be held to have been based solely upon the competent evidence in the case."

We submit that neither of these cases is authoritative upon the present point.

XVII.

The seventeenth assignment of error is based upon the refusal of the court to grant the instruction prayed by the caveator (Rec., pp. 56, 57), that the deed from the

testator to Miss Stevens was in the nature of a testamentary instrument, which might be considered in connection with the manner in which he had disposed of his estate, and, also, as bearing upon the interest of Miss Stevens in the questions involved in the suit.

The jury had the full benefit of hearing all the evidence upon which caveator based his request for this prayer and naturally considered it along with the other evidence bearing upon mental capacity and undue influence.

But this prayer would have given a weight and emphasis to this evidence which would have been contrary to law and reason. Appellant urges the propriety of the prayers upon the ground that the deed was in the nature of a testamentary gift, and says on page 35 of his brief, that it was to vest that portion of his estate in the grantee at the time of testator's death, "as gratuitously as any portion of his estate was to devolve upon the beneficiaries under the will."

This statement, however, is not supported by the record. On page 35 it appears from Miss Stevens' testimony that after she had been at the testator's house a few weeks, he asked her if she preferred to have him pay her a salary, or to have him pay her in his own way, and that she left it entirely with him. The memorandum, in the testator's handwriting, found on page 36 of the record, shows clearly that this deed was part of the testator's provision for Miss Stevens. So that this deed cannot be said to be gratuitous, and appellant's argument, based upon such claim, must fail. The opinion of the Court of Appeals upon this matter would seem to be conclusive (Rec., pp. 73, 74).

XVIII.

The eighteenth assignment of error is based upon the granting of appellees' instruction No. 6 (Rec., p. 57), to which the caveator objected. Said prayer instructed

the jury that if the testator possessed memory and mind enough to know the property he owned and desired to dispose of, the person or persons to whom he intended to give it, the manner in which he wished it to be applied by such person, and understood his purposes, and the business he was engaged in, the will would be valid. Examination of this prayer shows that it simply instructed the jury as to what constituted testamentary capacity.

On page 64 it appears that the court read its own instructions to the jury before reading those requested by counsel for the respective parties, and on page 63 it appears that the court gave a full and complete statement to the jury of the law relating to the subject of insane delusions. The court next instructed the jury as prayed by the caveators covering the very matter of this objection (Rec., p. 58), and gave a further statement of the effect of insane delusions, thereafter reading to the jury the prayers requested by the caveatees, among which the one objected to appears.

As to insane delusions, see—

4 L. R. A., 738.
12 L. R. A., 161.
37 L. R. A., 261.

We respectfully submit that after stating to the jury so fully the legal effect of insane delusions, the action of the court in granting the aforesaid prayer could not have had any misleading effect.

XIX.

The nineteenth assignment of error is based upon the action of the court in granting appellees' instruction numbered 13, as found on page 57 of the record. There was no error in granting this instruction, but even if

there had been any, it is cured by the instruction of the court found on pages 58 and 59 of the record—

> "that the evidence admitted in this case as to declarations made by the said Henry E. Woodbury, are not to be taken as evidence of the truth of the statements alleged to have been made by him, but they are to be taken, if believed to have been made by the testator, as throwing light upon his mental condition, and as representing his beliefs, his feelings, purposes, and designs."

The only medical witness who testified on behalf of the plaintiff in error, Dr. George P. Vaughan (Rec., p. 10), simply testified that he had practiced medicine for twenty-five years, that he had met the testator once upon a social occasion about five years before the trial and made him a professional visit about a year later, having been called in by Dr. Turner, who was at that time living with his uncle; and that he had received a very distinct impression on each of these occasions that the testator was a man of weak mind, and mentally incapable of transacting business or of making a valid deed or contract.

It is manifest from the record in this case that the evidence introduced on the part of the caveators would not have justified the jury in setting aside the will, either on the ground of undue influence or of unsoundness of mind. But, taken in connection with the evidence introduced on the part of the caveatees, it is evident that no verdict other than the one rendered, in favor of the will, could have been permitted to stand.

The instructions granted on behalf of the caveator were extremely liberal in his favor. The record shows that there was no prejudicial error committed by the court.

We respectfully submit, as peculiarly apt to this case,

the remarks of the Court of Appeals of Maryland, in *Safe Deposit and Trust Co.* vs. *Berry*, 93 Md., 560, 564, as follows:

> "The tendency to assail last wills upon the ground of mental incapacity, and by frivolous and inconclusive evidence, chiefly of a speculative character, whenever the testator has not disposed of his property in a way to suit disappointed and, often, distant and distasteful relations, has grown to such alarming proportions in late years that the courts should be resolute in adhering to the old and long-settled principles of the law respecting the admissibility of evidence, allowing no relaxation or refined modifications of them in this class of cases, if last wills and testaments are to be at all upheld by juries. It is no uncommon thing to see testamentary dispositions questioned, and it sometimes happens that they are successfully questioned, though there never had been a suspicion of the testator's capacity during his lifetime, nor after his death, until the contents of his will became known, and the expectations of collateral kindred were defeated by its provisions. These kindred frequently think they ought to have been the objects of his bounty, and because *he* thought differently they conclude he was incapable of intelligently thinking at all. Because what *he did* does not comport with what *they* believe he *should have done*, they assume he was mentally unsound, and forthwith attack his will, though they never doubted his ability to make a will until they discovered that he had made one which ignored or dissatisfied them. It is time that such groundless assaults should cease, and it is the plain duty of the courts to give them no encouragements or countenance."

And also of this court in *Beyer* vs. *Le Fevre*, 186 U. S., 114, 125, 126, in which this court states:

> "One who is familiar with the volume of litigation which is now flooding the courts can not fail

> to be attracted by the fact that actions to set aside wills are of frequent occurrence. In such actions the testator can not be heard, and very trifling matters are often pressed upon the attention of the court or jury as evidence of want of mental capacity or of the existence of undue influence. Whatever rule may obtain elsewhere we wish it distinctly understood to be the rule of the Federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor."

It is respectfully submitted that the judgment of the court below should be affirmed.

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Attorneys for Appellees and Defendants in Error.

condition of a testator is for the trial judge who has all the evidence and the witness before him, and in this case the trial judge does not seem to have abused his discretion as to the admission of testimony.

Evidence as to an alleged delusion of testator thirty years before execution of the will *held* to be properly excluded both because of remoteness and of the tendency to raise a collateral issue as to whether the statements connected therewith were or were not actually false.

Where the wife as caveator attacks testator's soundness of mind because he referred to himself at times as a widower and at times as divorced, an agreement of separation and a deed referring to himself as widower admitted solely to explain why testator so referred to himself *held* competent for that purpose, but evidence by the wife as to her reasons for signing the agreement and other instruments, in which she joined with her husband as his wife, were properly excluded.

The admission of incompetent evidence is not reversible error if subsequently it is distinctly withdrawn from the jury, and so *held* in this case where a letter was erroneously admitted but the presiding judge, at request of the party objecting to its admission, instructed the jury that nothing in such letter was to be taken as evidence of truth of the statements therein or even to be used for purposes of cross-examination.

29 App. D. C. 460, affirmed.

THE facts, which involve the validity of the will of Henry E. Woodbury, are stated in the opinion.

Mr. J. J. Darlington and *Mr. Charles F. Carusi* for appellant and plaintiff in error.

Mr. William F. Mattingly and *Mr. Stanton C. Peelle* for appellees and defendants in error.

MR. JUSTICE MOODY delivered the opinion of the court.

In this case we are asked to review, on appeal and writ of error, a judgment of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the District sitting as a Probate Court, which admitted to probate certain paper writings purporting to be the will and codicils thereto

of Henry E. Woodbury. The decree was based upon the findings of a jury upon two issues submitted to it, namely:

"(1.) At the time of the execution of the said several paper writings propounded for probate as the last will and testament of Henry E. Woodbury, deceased, was the said Henry E. Woodbury of sound and disposing mind and capable of making a valid deed or contract?

"(2.) Was execution of said paper writings procured by the fraud or undue influence of Sallie Woodbury, Mena Stevens, or either of them, or any other person or persons?"

The jury found that the testator was of sound mind and that he was not unduly influenced. The questions brought here arose upon the trial of those issues and are stated in the bill of exceptions duly allowed. There are nineteen assignments of error, relating to the admission or exclusion of evidence, and to the instructions or refusal of instructions to the jury. There was conflicting evidence upon the issues. As no question of the sufficiency of the evidence of either party is properly here, a brief preliminary statement of facts is sufficient, and any other facts which may be needed to explain the questions of law will be stated in connection with the disposition of those questions.

According to the practice in the District in a contest of this kind, those propounding the instrument for probate are called caveatees and those opposing its probate caveators.

The testator, Henry E. Woodbury, died January 15, 1905, seventy-nine years of age. The will was executed April 11, 1902, and five codicils were executed at different times from January 5, 1903, to December 20, 1904. With slight exceptions, the will and codicils devise and bequeath the real and personal property to charities. The testator had been a physician until 1881, when an injury compelled him to cease the practice of his profession. He was childless. He had married in 1870, and in less than two years had parted from his wife, and thereafter they lived separately, though without being divorced. A sister, Sallie Woodbury, lived with him until her death, in December, 1902. After the death of the sister, Mena M. Stevens became

his housekeeper and nurse. A nephew, Molyneaux L. Turner, was his heir and next of kin. His wife survived the testator, and, with the nephew, filed a caveat against the probate of the paper writings purporting to be a will and codicils.

1. The first eleven assignments of error relate to the admission or exclusion by the trial court of the testimony of lay witnesses as to their opinion for or against the mental capacity of the testator. In the view we take of these assignments of error they may be considered together, and without any statement as to the testimony of the several witnesses.

The rule governing the admission of testimony of this character, which has been prescribed by this court for the courts of the United States, is easy of statement and administration. Where the issue is whether a person is of sound or unsound mind, a lay witness, who has had an adequate opportunity to observe the speech and other conduct of that person may, in addition to relating the significant instances of speech and conduct, testify to the opinion on the mental capacity formed at the time from such observation. *Insurance Co.* v. *Rodel*, 95 U. S. 232; *Connecticut Mutual Life Ins. Co.* v. *Lathrop*, 111 U. S. 612; *Queenan* v. *Oklahoma*, 190 U. S. 548. In no other way than this can the full knowledge of an unprofessional witness with regard to the issue be placed before the jury, because ordinarily it is impossible for such witness to give an adequate description of all the appearances which to him have indicated sanity or insanity. Such testimony has been well described as a compendious mode of ascertaining the result of the actual observations of witnesses. Ordinarily, and perhaps necessarily, the witness in testifying to his opportunities for observation and his actual observation relates more or less fully the instances of his conversation or dealings with the person whose mental capacity is under consideration, and it is, of course, competent, either upon direct or cross-examination, to elicit those instances in detail.

The order of the evidence must be left to the discretion of the trial judge, but when sufficient appears to convince the

trial judge that the witness has had an opportunity for adequate observation of the person's mental capacity, and has actually observed it, then the judge may permit him to testify to his opinion. This was the course pursued by the trial judge in this case. With respect to each witness, whose testimony as to opinion was admitted or excluded, the judge exercised his discretion upon the qualifying testimony.

We are asked to review that discretion and to say that in the case of the eleven witnesses before us it was improperly exercised. We have no hesitation in declining to do this. No general rule can well be framed which will govern all cases, and an attempt to do that would multiply exceptions and new trials. The responsibility for the exercise of the judicial power of determining whether a given witness has the qualifications which will permit him, to the profit of the jury, to state his opinion upon an issue of this kind, may best be left with the judge presiding at the trial, who has a comprehensive view of the issue and of all of the evidence and the witness himself before his face.

This is not to say that in a very clear case an appellate court ought not to review the discretion of the trial judge. For instance, if it should appear that the witness had never spoken to the testator or seen any significant act, but merely observed him driving from day to day through the streets, and the opinion of such a witness as to sanity had been received, it would be the duty of the appellate court to correct the error. On the other hand, if the witness for years had been in constant communication with the testator, had frequently conversed with him and observed his conduct from day to day, the exclusion of the opinion of the witness ought to be corrected by the appellate court. These are instances of a plain abuse of judicial discretion.

The true rule of action for an appellate court is stated in *Wheeler* v. *United States*, 159 U. S. 523. In that case this court was considering the admissibility, upon the trial of an indictment for murder, of the testimony of a boy five and a

half years old at the time of the trial. The court, speaking by Mr. Justice Brewer, said (p. 524):

"The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous."

Though the question of competency in that case differed materially from the questions of competency in this case, the spirit which underlies the statement of the court there ought to govern here.

We have examined these eleven assignments of error and brought them to the test of the foregoing principles. We find that no admissions or exclusions of testimony were clearly erroneous, and accordingly all the assignments are overruled.

2. The caveators, on the issue of unsoundness of mind of the testator in 1902, and the following years, offered in evidence the record in a suit for divorce brought by the testator in 1872, and more especially that part of the record wherein he alleged, as a cause for divorce, that his wife was incapable of a valid marriage on account of a physical malformation. The physicians appointed by the court reported, after an examination of the wife, that the condition alleged did not exist. The offer of this evidence was accompanied by the contention that it showed a delusion on the part of the testator. The evidence was excluded and we think rightly, either upon the ground that it was too remote in point of time or that it would lead to a collateral inquiry whether the statement was actually false, and if so, whether it was the result of a delusion, or of malice or falsehood.

3. The caveators had introduced evidence that the testator had spoken of himself as a widower and as having been divorced

from his wife, both of which statements were untrue. Obviously, the testimony that these statements had been made by the testator could only have been admitted as proof of mental unsoundness. To meet this testimony, and the inference which might be drawn from it, the judge admitted in evidence a written agreement made in 1887 by the testator with his wife. The material parts of the agreement follow:

"Witnesseth: That, whereas the said Anna L. Woodbury is seized and possessed of certain lands and real estate in her own right in the city of Washington, D. C., and Cambridge, Mass.; and whereas the said Anna L. Woodbury desires to be able to sell, dispose of and convey the same as she could were she a *femme sole;* and whereas she is unable to do so unless by and with the consent and agreement of her said husband aforesaid, Henry E. Woodbury;

"Now, therefore, it is agreed by these presents that the said Henry E. Woodbury will permit the said Anna L. Woodbury to sell, dispose of and convey any and all of her real estate as at any time she may desire to do; and in consideration of this relinquishment of all right, title, interest and claim of him, the said Henry E. Woodbury, in and to, the property and lands of the said Anna L. Woodbury, the said Anna L. Woodbury hereby covenants and agrees for herself, her heirs and assigns, to relinquish all and every right, title, interest and claim that she (or they through her) may have to any and to all of the property personal or real that the said Henry E. Woodbury possesses now or may hereafter acquire, together with her right of dower in any estate the said Henry E. Woodbury may leave in case of his demise. And she the said Anna L. Woodbury further covenants and agrees with the said Henry E. Woodbury, that under no circumstances will the said Anna L. Woodbury ask for, demand or claim from him alimony or a support for any time past, present or to come.

"In short this covenant and agreement is intended to restore to each of the aforesaid parties—Anna L. Woodbury and Henry E. Woodbury—the same right to contract, to use or to dispose

of their respective properties, lands and estates—personal and real—as they possessed before they were married."

Counsel for the caveatees offered this to explain the statements of the testator, and urged its admission in connection with the fact of separation. The caveators' counsel objected to it, because it showed neither a divorce nor that the testator was a widower. The judge then said: "I think it may be competent to explain the situation here, and I will admit it." The judge further said: "Inasmuch as you have two contradictory statements from him, I think this may come in in response to that." Counsel for the caveatees, in the course of the discussion, said: "We have a right to show the relations existing between Dr. Woodbury and members of his family," but the court did not assent to this proposition and made no response to it.

We think it is clear that this agreement was admitted solely for the purpose of explaining the testator's statement about his divorce and widowerhood. If the caveators wished to limit its use, any further than it was limited by the judge in the ruling admitting it, an instruction to the jury should have been asked. We think it is competent for the purpose for which it was offered and admitted, and that its weight was for the jury. In it the wife relinquished all claims to her husband's property, real or personal, and all right to dower or of alimony, or of other support, and concluded by saying: "This covenant and agreement is intended to restore to each of the aforesaid parties—Anna L. Woodbury and Henry E. Woodbury—the same right to contract, to use or to dispose of their respective properties, lands and estates—personal and real—as they possessed before they were married." Though the weight of this evidence might have been slight, we think the evidence was competent.

4. The caveators, for the purpose of explaining the signature by the wife to the agreement of 1887, then offered to prove by her deposition that she had been advised by physicians, now dead, to sign any paper that the testator wished her to sign, and that it was the mania of the testator to be rid of her and

her property, and that the testator had said to them that he would die if he could not get rid of both. This testimony was excluded, and we think rightly. The motive of the wife in signing the agreement of 1887 was entirely immaterial. She did sign it, and it was admitted solely for the purpose of explaining the testator's statement that he was a widower and had been divorced.

5. The facts upon which the next assignment of error is based are very obscure. Mena M. Stevens, the nurse, was called as a witness by the caveatees. Upon cross-examination, she testified that in 1903 and 1904 she had received from the testator gifts of certain stock and a deed to certain lands, whose rental value was $21.90 per month. The deed was delivered to a person to keep for the nurse until the testator's death. This deed was offered in evidence by the caveators. It was dated September 12, 1904. The testator described himself in this deed as a widower. Thereupon caveatees put in evidence, without objection, a deed from Henry E. Woodbury and Anna L. Woodbury, his wife, to the American Security and Trust Company, dated November 18, 1903. Whether this deed included the same land conveyed to Stevens we are unable to tell from the descriptions, but we assume it did not. The purpose for which the deed was offered does not appear. As it was admitted just prior to the admission of the agreement of 1887, and subsequent to the admission of the deed to Stevens, in which the testator called himself a widower, we may fairly assume that, like the agreement of 1887, it was offered to explain the use of the word "widower." There is nothing in the bill of exceptions to show that it was used for any other purpose, and we treat it as limited to that purpose.

The caveators offered, by the deposition of the wife, to prove the same explanation of this deed as was offered for the agreement of 1887, but the evidence was excluded. We think that the caveators have not shown that the excluded evidence was competent, and we therefore overrule this assignment of error.

It should be said generally of this and the preceding assign-

TURNER *v.* AMERICAN SECURITY AND TRUST COMPANY.

APPEAL FROM AND IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 101. Argued March 9, 10, 1909.—Decided April 5, 1909.

Where the issue is whether a person is of sound or unsound mind, a lay witness, who has had an adequate opportunity to observe the speech and conduct of that person, may, in addition to relating the significant instances of speech and conduct, testify to the opinion formed at the time of observation as to the mental capacity of such person.

While a general rule cannot be framed for all cases, and in clear cases of abuse the appellate court should reverse, the determination of whether a witness is qualified to state his opinion as to the mental

ment of error that there is nothing to show that the instruments were received or used as evidence that the wife regarded the testator as of sound mind and capable of transacting business. There was, therefore, no occasion to offer evidence to explain the act and destroy the effect of the admission. The whole argument for the admissibility of the explanatory evidence is based upon the theory that the instruments were offered to show the wife's belief as to his mental condition—a theory which finds no support in the bill of exceptions. If the instrument had been admitted and used for that purpose a different question would be presented.

6. Turner was called as a witness in his own behalf. On cross-examination he was asked if he had made certain insulting remarks to his aunt, Sallie Woodbury. He replied that he had not. He was then shown a paper and asked if it was in his aunt's handwriting, and replied that it was, and was a letter addressed to William H. Turner. He was then asked, over the objection and under the exception of the caveators, whether the letter did not assert that the witness had made the insulting statements. The cross-examining counsel was then permitted to read the letter for the purpose of examining the witness upon the statements contained in it. This was done over objection and under exception. The letter stated that the witness had made the insulting remarks which he had denied making. The cross-examining counsel proceeded: "Now, do you mean that that statement by her is untrue?" Answer: "I do not remember making any such statement; I am not in the habit of using any such language."

It is too clear for discussion that the use permitted to be made of this letter was erroneous, and if the matter had stopped there we should be compelled to grant a new trial. The presiding judge, however, instructed the jury in behalf of the caveators, and, it would seem, at their request, as follows:

"While the caveator was allowed by the court to be cross-examined as to the statements contained in an undated letter, purporting to have been written by his aunt, Sallie Woodbury,

addressed to William H. Turner, the jury are instructed that neither the said letter nor the use thereof so allowed by the court to be made upon the cross-examination of the caveator is to be taken as evidence of the truth of any of the said statements in said letter contained or allowed to be used for the purpose of cross-examination as aforesaid."

The general rule is that the admission of incompetent evidence is not reversible error if it subsequently is distinctly withdrawn from the consideration of the jury. *Pennsylvania Co.* v. *Roy*, 102 U. S. 451, 458; *Hopt* v. *Utah*, 120 U. S. 430, 438. There are cases which emphasize the necessity of clearly and unmistakably withdrawing the evidence from the consideration of the jury. *Washington Gas Light Co.* v. *Lansden*, 172 U. S. 535, 554; *Throckmorton* v. *Holt*, 180 U. S. 552, 567. But we are satisfied that this was done in this case, and that the instruction cured the error. It directed that the letter should not be taken as evidence of the truth of any of its statements or even allowed to be used for the purpose of cross-examination.

7. The remaining assignments of error relate to two instructions given to the jury and the refusal of an instruction requested by the caveators. None of the questions raised here touches upon any vital part of the case, and, while not waived, they were not much insisted upon in argument. An examination of the charge satisfies us that it contained all that the caveators were entitled to and that it was correct, full and adequate to present the issues to the jury. We will not prolong this opinion beyond what was said in the court below on this subject, which we approve.

Judgment affirmed.

MR. JUSTICE HARLAN did not take part in the decision of this case.